Supreme Court, U.S.
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No. __-____ 98 2042 JUN 2 1 1999

IN THE

Supreme Court of the United States

JAMES BENJAMIN, *et al.*,

Petitioners,

—against—

BERNARD KERIK, Commissioner,
New York City Department of Correction, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the judgment termination provision of the Prison Litigation Reform Act, 18 U.S.C. § 3626(b), which compels Article III courts to reopen final injunctive judgments in prison litigation under a standard not in effect at the time the judgments were entered, violates the principle of separation of powers by mandating the reopening of final judgments of Article III courts.

2. Whether 18 U.S.C. § 3626(b) deprives litigants of property without due process of law by compelling the reopening of final injunctive judgments in prison litigation under a standard not in effect at the time judgment was entered.

3. Whether 18 U.S.C. § 3626(b) denies litigants the equal protection of the laws by terminating only those injunctive judgments benefiting prisoners under standards applicable to no other group.

LIST OF PARTIES

JAMES BENJAMIN, MIGUEL GALINDEZ, BRUCE HAYES, JOSE SALDANA and ROBERT ESCHERT, detainees of the New York City House of Detention for Men; GUY ZEPTH AMBROSE, LUIS GILCES, FARUK ABDUL GHANI, and JOHNNY JOHNSON, detainees of the Bronx House of Detention for Men; IOLA FORTS and FANNIE BRYANT, detainees of the New York City Correctional Institution for Women; RAYMOND MOCTEZUMA, RONALD FOY, LAWRENCE ODOM, FRANK WILLIAMS, detainees of the Brooklyn House of Detention for Men; ERNESTO MALDONADO, CARL ROBINSON, JAMES CANNADY, detainees of the Adolescent Remand and Detention Center; RALPH VALVANO, DONALD LEROLAND, and JONATHAN WILLIAMS, detainees of the Queens House of Detention for Men; DAVID ROSENTHAL, DOLPH ROSOFF, WILLIE LYNCH, FELIX RIVERA, RAMON MONAGAS, CLIFFORD WILSON, NATHANIEL BELL, SANTOS CEPEDA, GREGORY CHURCHILL, and JOE DAVID EDMONSON, JR., detainees of the Rikers Island Adult Mental Health Unit; individually and on behalf of all other persons similarly situated,

Petitioners,

-against-

BERNARD KERIK, Commissioner of the New York City Department of Correction; GARY M. LANIGAN, First Deputy Commissioner of the New York City Department of Correction; HOWARD ROBERTSON, Warden of the New York City House of Detention for Men; ANDREW TOLSON, JEROME DAVIS, and R. BITZ, Deputy Wardens of the New

York City House of Detention for Men; CLYTON EASTMOND, Acting Warden of the Bronx House of Detention for Men; GLEN SYLVESTER, Warden of the New York City Correctional Institution for Women; LEROY GRANT, Acting Warden of the Brooklyn House of Detention for Men; STEVEN CONRY, Warden of the Adolescent Remand and Detention Center; JORGE OCASIO, Acting Warden of the Queens House of Detention for Men; PETER MAHON and P. PANAGI, Deputy Warden of the Queens House of Detention; RUDOLPH GIULIANI, Mayor of the City of New York; NEAL COHEN, Health Commissioner and Health Services Administrator of the City of New York,

Respondents.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

JAMES BENJAMIN, et al.,

Petitioners,

against

BERNARD KERIK, Commissioner,
New York City Department of
Correction, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioners James Benjamin *et al.*, on behalf of themselves and all others similarly situated, respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The *en banc* decision of the United States Court of Appeals for the Second Circuit, Appendix at 1a, is reported at 172 F.3d 144 (2d Cir. 1999). The prior panel opinion of the Second Circuit, Appendix at 101a, is reported at 124 F.3d 162 (2d Cir. 1997). The decision of the District Court from which the appeal was

taken, Appendix at 140a, is reported at 935 F.Supp. 332 (S.D.N.Y. 1996).

JURISDICTION

The Judgment of the United States Court of Appeals sought to be reviewed was entered on March 23, 1999.

The statutory provision believed to confer jurisdiction on this Court to review the said Judgment on a writ of certiorari is 28 U.S.C. § 1254(1).

The district court had jurisdiction over these consolidated cases under 28 U.S.C. § 1331 because Petitioners' claims under 42 U.S.C. § 1983 arose under the Constitution and laws of the United States.

Title 28 U.S.C. § 2403(a) may apply. The courts below did not certify to the Attorney General that the constitutionality of an Act of Congress had been drawn into question, but Petitioners' counsel so notified her, and the United States intervened and filed a brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 1 of the Constitution provides in relevant part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Fifth Amendment to the Constitution provides in relevant part that:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

Section 802 of the Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626(b) (West Supp. 1999), provides:

> (2) Immediate termination of prospective relief.--In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.
>
> (3) Limitation.--Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation[1] of the Federal right, extends no further than necessary to correct the violation of the Federal rights, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

Rule 60(b), Fed.R.Civ.P., provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final

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[1] The statute as initially enacted referred to a "current or ongoing violation"; a 1997 amendment changed the language to "current and ongoing." P.L. No. 105-119, 111 Stat. 2470 (November 26, 1997).

judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application.

STATEMENT OF THE CASE

A. Background of the Present Proceedings

During the 1970s, pre-trial detainees in the New York City jails filed separate suits, all certified as class actions, challenging their conditions of confinement. Appendix at 7a (listing cases). After a series of decisions finding constitutional violations,[2] the parties entered into a settlement ("the consent decrees"), *see* Appendix at 185a, 188a,[3] intended to establish on a uniform basis humane and constitutional conditions of confinement. Joint Appendix on Appeal ("J.A.") 196. The decrees addressed many subjects, including the

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[2] *See, e.g., Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392 (2d Cir. 1975) (affirming finding of unconstitutional overcrowding); *Rhem v. Malcolm*, 507 F.2d 333 (2d Cir. 1974) (affirming finding that totality of conditions were unconstitutional); *Benjamin v. Malcolm*, 75 Civ. 3073 (S.D.N.Y., June 8, 1977) (entering final judgment concerning overcrowding and other issues).

[3] The consent decrees comprise Partial Final Judgments by Consent in each case, each of which adopts and incorporates a Stipulation for Entry of a Partial Final Judgment by Consent which contains the substantive terms of the settlement. Since the consent decrees are nearly identical in terms, petitioners have attached only one of them. The consent decrees have subsequently been modified and supplemented in various respects. *See, e.g., Benjamin v. Jacobson*, 923 F.Supp. 517 (S.D.N.Y. 1996) (granting defendants' request for a modification of legal access services to segregated prisoners).

handling of detainees' mail and property, cell and body searches, maintenance of the physical plant (including vermin and insect control, sanitation, maintenance and refuse removal), food service and related health and sanitary issues. Appendix at 143a. The separate cases were then consolidated for enforcement.

Defendants' failure to comply with the decrees led to a number of post-judgment proceedings, resulting in the establishment of a court monitor (the Office of Compliance Consultants), the entry of a number of more specific orders, JA 571, two findings of contempt,[4] and the imposition of monetary sanctions on those and other occasions.[5] Several times the court found constitutional violations as well as noncompliance with the decrees.[6] Only last November the district court found that fire safety deficiencies at several jails violated the consent decrees' requirement that the jails be maintained in a safe condition, which

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[4] *Benjamin v. Malcolm*, 156 F.R.D. 561, 568 (S.D.N.Y. 1994); *Benjamin v. Sielaff*, 752 F.Supp. 140, 148 (S.D.N.Y. 1990).

[5] Order re: Noncompliance with Food Service Work Plan (S.D.N.Y., August 17, 1993); Opinion and Order re: Fines for Violation of Compliance Monitoring Work Plan (S.D.N.Y., March 1, 1995); *see* JA 571.

[6] *Benjamin v. Sielaff*, 752 F.Supp. at 141-42 (finding constitutional violation in housing newly admitted detainees for days in receiving rooms and other non-housing areas); *Benjamin v. Koehler*, 710 F.Supp. 91, 93-94 (S.D.N.Y. 1989) (finding that modifications sought in crowding orders would result in unconstitutional conditions); *Benjamin v. Malcolm*, 659 F.Supp. 1006, 1008 (S.D.N.Y. 1987) (same); *Benjamin v. Malcolm*, 646 F.Supp. 1550, 1555 (S.D.N.Y. 1986) (same); *Benjamin v. Malcolm*, 564 F.Supp. 668, 684-85 (S.D.N.Y. 1983).

the court equated with the Fourteenth Amendment's requirement that "fire safety protections must be afforded at a level that does not expose the plaintiffs to an unreasonable risk of serious damage to their future health." Appendix at 255a.

In 1987 the court approved an agreed method for ending this litigation: a "disengagement plan" under which, at defendants' request, OCC is to assess, issue by issue, (1) whether the decree's requirements have been substantially satisfied, (2) there is reason to believe that compliance will be maintained, and (3) the defendants have implemented an internal monitoring mechanism and method for resolving compliance complaints. JA 211, 217. The defendants have never sought to invoke the Disengagement Plan.

B. Proceedings in the District Court

The defendants still had not complied with the Consent Decrees and supplemental orders when the present proceedings began. In early 1996, OCC reported non-compliance in a number of significant areas, including fire safety, maintenance, sanitation, inmate classification, food service, inmate property, and due process. JA 326-88. Later in 1996, OCC reported continuing noncompliance in areas including the plumbing system, JA 569, Exh. 21; general maintenance, JA 569, Exh. 23; sanitation, JA 569, Exh. 24; safeguarding of property, and telephones. Fire safety deficiencies remained largely uncorrected. A panoply of unsafe and unsanitary conditions existed in modular housing units on Rikers Island. JA 230-35, 464-67.

On April 26, 1996 the Prison Litigation Reform Act of 1995 ("PLRA"), Pub.L. No. 104-134, § 802(b)(1), 110 Stat. 1321, 1321-70, was enacted as part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996. The defendants moved on May 24, 1996 to terminate the consent decrees and all supplemental orders based on the PLRA. The

Petitioners challenged the Act's constitutionality and the United States intervened to defend it. The district court (Harold Baer, Jr., D.J.) ruled on July 23, 1996 that the statute was constitutional and that the consent decrees and supplemental orders should be vacated. Appendix at 182a-183a. Petitioners moved to alter or amend the judgment, requesting *inter alia* an opportunity to make a record concerning "current or ongoing" federal law violations, since the time constraints created by the PLRA's automatic stay provision[7] had precluded any meaningful opportunity to do so; Petitioners also sought a stay pending appeal. JA 94-100. The court granted a stay until such time as a stay application could be brought before the court of appeals, and otherwise denied the motion. Appendix at 13a.

C. Proceedings in the Court of Appeals

Petitioners appealed the district court's decision and the Court of Appeals granted a stay pending its own decision. On August 26, 1997 a panel of the Court of Appeals affirmed in part, reversed in part, and remanded. The panel began by noting that the provision for "immediate termination of prospective relief," 18 U.S.C. § 3626(b)(2), is ambiguous and can be read either to bar the future enforcement of consent decrees, except insofar as they are tailored to a federal right, or to render them null and void unless they met the narrow tailoring requirement. Appendix at 107a-

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[7] This provision, 18 U.S.C. § 3626(e)(3), originally prescribed that prospective relief in prison conditions cases was automatically stayed 30 days after the filing of a motion to terminate. A subsequent amendment provides that the district court may extend the 30-day period by up to an additional 60 days for "good cause." Pub.L. No. 105-119, 111 Stat. 2470, 18 U.S.C. § 3626(e)(3) (West Supp. 1999).

109a. The panel adopted the first interpretation, both on its merits and to avoid the serious constitutional questions that the second, judgment-annulling interpretation would raise. Appendix at 109a-112a, 131a n. 18.

The panel then upheld the statute against all of Petitioners' constitutional challenges, but cautioned that it did so only under its limiting construction, and that the alternative approach, which would annul the judgments themselves, would indeed present "serious constitutional difficulties." Appendix at 131a n. 18. Under the panel's construction the Decrees would no longer be enforceable in federal court, except to the extent that the court made findings that they "remain[] necessary to correct a current or ongoing violation of the Federal right, extend[] no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." Appendix at 136a, *quoting* 18 U.S.C. § 3626(b)(3). However, "[t]he underlying contract, in its time made into a judgment, is left untouched" and may be enforced in state court. Appendix at 134a.

Based on this analysis, the panel held that the district court erred in vacating the decrees and that Petitioners have the option to seek to show entitlement to continuing federal court relief under § 3626(b)(3), or to seek enforcement in state court. It also held that the district court erred in vacating the decrees, since § 3626(b)(3) calls only for the termination of prospective relief. Appendix at 129a-133a.

By order dated December 23, 1997, the Court of Appeals granted rehearing *en banc*, Appendix at 99a, and issued its decision on March 23, 1999. It held that despite the linguistic ambiguity noted by the panel, Congress's intent was unambiguously to terminate consent decrees; that it "seems implausible" that Congress intended them to remain enforceable in

state courts; and that in any case, the consent decrees were conditional on federal court approval, and ceased to be enforceable when that condition failed. Appendix at 22a-27a. However, it went on, the district court erred in directing vacatur of the decrees; the statute prescribes their termination, not annulling them and stripping them of past significance or collateral effect. Appendix at 28a-29a.

The court then upheld the constitutionality of the statute against Petitioners' challenges based on the separation of powers and the Fifth Amendment's Due Process Clause, including a challenge based on the equal protection principle of that Clause. Appendix at 29a-41a. Finally, it held that the Petitioners were entitled to an opportunity, which they had not yet had, to show the existence of "current and ongoing" federal law violations that would justify the retention of part or all of the decrees. Appendix at 41a-44a.

REASONS FOR GRANTING THE WRIT

I. 18 U.S.C. § 3626(b) IS AN UNPRECEDENTED BREACH IN THE PRINCIPLE OF SEPARATION OF POWERS AND PRESENTS A QUESTION FUNDAMENTAL TO THE CONSTITUTIONAL STRUCTURE.

In enacting § 3626(b), Congress has made an unprecedented assertion of power to require federal courts to revise final injunctive judgments of Article III courts according to Congress's orders. If this Act is constitutional, Congress has the power to interfere, essentially at will, with *constitutional* judgments of the federal courts whenever they are embodied in injunctive orders. The implications of this holding go far beyond prison litigation, placing Congress in the position of a court of revision in any injunctive case where

the losing party has the resources to lobby for a different result.

Article III, § 1 of the Constitution provides: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This explicit allocation of power "serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (citations and quotation marks omitted).

Before enactment of 18 U.S.C. § 3626(b), there was no instance in our system of separated powers in which Congress decreed that Article III courts shall terminate final injunctive judgments in constitutional cases. As the Court observed in a similar context, "[t]hat prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

In *Plaut*, the Court removed all doubt that final judgments of an Article III court are immune from revision by the other branches. 514 U.S. at 234. Congress may not subject them, individually or in gross, 514 U.S. at 228, to "a reopening requirement which did not exist when the judgment was pronounced." *Id.*, 514 U.S. at 234. That is because the constitutional design "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy--with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a judicial Power' is one to render dispositive judgments." *Id.*, 514 U.S. at 218-19 (citation omitted).

The point of *Plaut* is that immunity from legislative revision is central to a "dispositive judgment." *Id.*[8]

Section 3626(b) indisputably imposes a new reopening requirement. When the judgments were entered, they could be reopened only via the traditional power of an equity court, codified in Rule 60(b)(5), Fed.R.Civ.P., over its own injunctive judgments. Indeed, this Court has explicitly confirmed that an injunctive consent decree much like this one is "a final judgment that may be reopened only to the extent that equity requires," *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992)--a holding now squarely overturned by § 3626(b).[9]

Under that recognized equitable standard, a decree may be ended when defendants have complied for a reasonable period of time, have exhibited a good-faith commitment to the decree and the underlying law, and are "unlikely to return to [their] former ways." *Board of Educ. v. Dowell*, 498 U.S. 237, 247-50

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[8] *Plaut* distinguished cases upholding legislation that "altered the prospective effect of injunctions" and said "nothing in our holding today calls them into question." 514 U.S. at 232. But the only such case it cited is *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). As explained below, that case is readily distinguishable from the instant case, and the language in *Plaut* regarding injunctions does not dispose of the question presented here.

[9] In *Rufo*, the Court stated: "A proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor." 502 U.S. at 391. That is exactly what § 3626(b)(3) does in requiring that final injunctive judgments be terminated except to the extent that they "remain[] necessary to correct a current and ongoing violation of the Federal rights" and are narrowly drawn and the least intrusive means to do so.

(1991); *accord Freeman v. Pitts*, 503 U.S. 467, 491 (1992). Likewise under that standard, while the decree is in effect, it may be modified only if there is a "significant change in circumstances" in either fact or law, and the proposed modification is "suitably tailored to the changed circumstance." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. at 383.[10] These standards are very different from § 3626(b)'s termination of judgments based on the lack of findings that were not required at the time they were entered.

The court below, and other courts that have upheld § 3626(b), have done so on grounds that are both invalid and exceptionally dangerous to the constitutional allocation of power among coordinate branches. They have relied on an analogy to *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) ("*Wheeling Bridge II*"), in which a statute declaring a bridge to be a post road and authorizing its continued existence was held to trump a prior injunction against maintaining or reconstructing the bridge.

The analogy is false. In *Wheeling Bridge II*, Congress had done nothing with respect to the court's

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[10] While these decisions postdate the decrees in this litigation, the Court made it clear that it was breaking no new ground in its holdings. In *Rufo*, the Court stated that it was applying "the traditional flexible standard for modification of consent decrees," rejecting an argument that a 1932 decision had "harden[ed]" that standard. 502 U.S. at 379-80 (distinguishing *United States v. Swift & Co.*, 286 U.S. 106 (1932), from *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968) and *Railway Employees [System Federation] v. Wright*, 364 U.S. 642, 647 (1960).) *Dowell* similarly relied on *United States v. United Shoe Machinery Corp.* and *Brown v. Board of Education*, 349 U.S. 294, 299-301 (1954). *See* 498 U.S. at 247-48.

judgment. Rather, Congress had simply altered the substantive legal rights that the injunction enforced--legal rights that, unlike the constitutional rights asserted in the instant cases, were entirely within Congress's power.[11] The judiciary then declined to continue to enforce these now nonexistent rights. When legislation alters the underlying law "to make legal what the decree was designed to prevent," an equity court obviously should exercise its discretion to alter its own judgments. *Rufo*, 502 U.S. at 388; *see System Federation v. Wright*, 364 U.S. 642 (1960) (holding that consent decree barring union shops should be modified to reflect statutory amendment legalizing union shops). That is a far cry from Congress's action in § 3626(b), which directly mandates the termination of existing prospective injunctions without eliminating or altering the underlying legal rights.

Rather than recognizing this crucial distinction,[12] the court below compounded its error:

> . . . [T]o the extent that a court's final judgment consists of an injunction, Congress may require alteration or termination

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[11] *Wheeling Bridge II* involved a bridge over a navigable river, a subject over which Congress has "paramount power." *Bridge Company v. United States*, 105 U.S. 470, 475, 480 (1881).

[12] Those courts that have struck down § 3626(b) have emphasized precisely this point in distinguishing *Wheeling Bridge II*. *See Taylor v. United States*, 143 F.3d 1178, 1183 (9th Cir.), *rehearing granted, opinion withdrawn*, 158 F.3d 1059 (9th Cir. 1998); *Ruiz v. Johnson*, 37 F.Supp.2d 855, 876-77 (S.D.Tex. 1999); *Denike v. Fauver*, 3 F.Supp.2d 540, 546-47 (D.N.J. 1998), *overruled by Imprisoned Citizens Union v. Shapp*, 169 F.3d 178 (3d Cir. 1999).

> of its future effect if the law on which the injunction was predicated has been changed. These conditions are satisfied here. By statute Congress has altered the courts' remedial powers so that, in this class of cases, injunctions may not be issued if they are not constitutionally mandated.

Appendix at 33a.

But a law overturning injunctions is not a change in "the law on which the injunction was predicated"; it is a change in the substance of the injunctions themselves.[13] "With respect to the *existing* consent decrees, the only 'change in law' that Congress has brought about is to say, 'terminate the relief.'" *Taylor v. United States*, 143 F.3d at 1183. If legislation that authorizes reopening of judgments is itself deemed a change in law that justifies reopening of judgments, this tautological exception will swallow the rule protecting final judgments. In effect, any act of Congress nullifying any injunctive decree or class of decrees will serve as its own justification. There is no apparent limiting principle to this rationale, which would permit Congress to depart from its role of making the law that courts enforce and to step into the role of deciding cases.

Nothing in this Court's precedents supports the legislative alteration of judgments that is worked by § 3626(b). The cases cited by the appeals court, Appendix at 34a, are either irrelevant to such legislative alteration[14] or, as in *Rufo* and *System Federation v.*

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[13] The fact that the statute is framed in general terms to affect a category of cases, rather than naming a particular case, does not save it. *Plaut*, 514 U.S. at 228.

[14] *Chrysler Corp. v. United States*, 316 U.S. 556, 562 (1942), affirmed a modification based on changed factual cir-

Wright, *supra*, follow the pattern of *Wheeling Bridge II*, in which the courts adjusted their prospective orders to reflect Congress's changes in the substantive law.

Section 3626(b) is not saved by what some courts have termed its "savings clause," under which plaintiffs may retain previously ordered relief to the extent that they show a "current and ongoing violation" of federal law. That fact places the Petitioners "in no better position than if they simply started a new action." *Taylor*, 143 F.3d at 1184. In substance, it nullifies the judgment, and the availability of further proceedings does not cure this breach of the finality principle. That result is indistinguishable in principle and practice from the actions of colonial legislatures mandating new trials in completed litigation, which was one of the evils that our system of separated powers was designed to cure. *See Plaut*, 514 U.S. at 219.[15]

The court below, and others that have upheld § 3626(b), have cited "the inherent power of the courts

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cumstances, not legislative action. *United States v. Swift & Co.*, 286 U.S. at 114-15, also asserted the court's power to modify judgments based on changed facts, and denied modification. *Agostini v. Felton*, 521 U.S. 203, ___, 117 S.Ct. 1997, 2006 (1997), reaffirmed the familiar proposition that injunctions may be modified in light of changes in fact and law, and directed modification based on changes in judicial precedent.

[15] As the Court stated: "It was common for such legislation not to prescribe a resolution of the dispute, but rather simply to set aside the judgment and order a new trial or appeal. . . . [S]uch legislation bears . . . on the problem of finality of judicial judgments." *Id.*

to modify or terminate forward-looking injunctive provisions in light of changes in law or circumstances," Appendix at 35a, in some cases suggesting that for this reason injunctive judgments are never final for purposes of the separation of powers. *See, e.g.*, *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 657 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 2366 (1998). The Court rejected this argument in *Plaut*. There, the petitioners had cited Fed.R.Civ.P. 60(b), which codifies that equitable power. The Court stated: "Rule 60(b), which authorizes discretionary judicial revision of judgments in the listed situations and in other 'extraordinary circumstances,' . . . does not impose any legislative mandate-to-reopen upon the courts, but merely reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." 514 U.S. at 233-34. While *Plaut* itself dealt with a money judgment, Rule 60(b) also codifies the requirements for revision of injunctive judgments.

Moreover, the notion that an injunctive judgment is not final for separation of powers purposes fundamentally contradicts the logic of *Plaut*, which states that it is "[t]he rules of finality, both statutory and judge-made" that confer "the immunity from legislative abrogation" of final judgments. 514 U.S. at 228, 230. That is, the rules of finality are the same for separation of powers purposes as for any other purpose. Had Congress created different finality rules for injunctive and other judgments, or were such a distinction made in the Federal Rules of Civil Procedure, we would have a different case (as indeed we do in cases of injunctions entered after § 3626(b) was enacted). But the rules of finality contained no such distinction when these judgments were entered, and it cannot be imposed on them after the fact.[16]

It is no answer to say that § 3626(b) addresses only the prospective effects of injunctions.[17] Since the point of an injunction is to have prospective effect, doing away with that effect is to do away with the injunctive judgment. More generally, in an equitable case, to "render dispositive judgment" is to shape a remedy that is calculated to put an end to the violation of law, and to see that the remedy is implemented. *See Freeman v. Pitts*, 503 U.S. at 491; *Board of Educ. v.*

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[16] Holding injunctions non-final for separation of powers purposes would prove too much. Since finality with respect to the separation of powers is essential to a "dispositive judgment," a case that could not be resolved finally with respect to the separation of powers would be outside the scope of Article III and could not be heard by an Article III court. *See Gordon v. United States*, 117 U.S. 697, 700-704 (1864), *cited in Plaut*, 514 U.S. at 226 (holding that the Supreme Court lacked Article III power to review Court of Claims judgments over which Secretary of the Treasury retained power of approval). Such a result would be absurd both on its face and in light of Article III's language extending the judicial power to "all Cases, in Law and Equity," arising under federal law.

[17] Indeed, the distinction between prospective and retrospective effects cannot be limited to injunctions. A damage judgment that has not been fully executed has a prospective effect, i.e., the defendant must pay in the future. A statute that adjusted the courts' remedial powers by forbidding writs of execution in certain cases or types of cases, leaving the judgment formally intact but robbing it of effect, would surely violate the rule of *Plaut*. There is no principled distinction between that scenario and the prospective termination of an injunction.

Dowell, 498 U.S. at 247-50 (both noting that compliance with orders is a prerequisite to their termination). A statute that terminates injunctive relief without regard to compliance with the court's orders deprives the court of the ability to render a "dispositive judgment."

The question of the limits on Congress's power to require reopening of injunctive judgments is important not just for prison litigation but for all litigation, and indeed for how the nation governs itself. Over the past several decades scores of bills have been introduced to nullify, formally or informally, politically unpopular federal judicial action in areas such as abortion rights, school prayer, and public school desegregation.[18] Until the PLRA, none were passed. Now that the line has been crossed, if the Court upholds § 3626(b), one can expect further efforts to curtail the judiciary's actions on behalf of other unpopular constituencies and causes.[19] It is worth considering whether the nation's public schools could ever have been desegregated had Congress thought, and the courts agreed, that it could pass statutes like § 3626(b) to reopen desegregation decrees, demanding new findings and erecting other new obstacles to the implementation of adjudicated rights.[20]

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[18] *See* Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 499 (1974).

[19] Presently pending is S. 248, 106th Congress, 1st Sess. (1999), which at § 3 would impose similar termination provisions on all civil actions involving prospective relief binding State or local officials, specifically including relief entered before the date of enactment.

[20] For example, the district court order that became the sub-

Nor can the effects of upholding § 3626(b) be limited to civil rights litigation. Injunctive relief generally and consent decrees in particular are widely used in litigation concerning anti-competitive business practices, environmental protection, securities regulation, labor relations, and private commercial matters. *See, e.g.*, Marc I. Steinberg, *SEC and Other Permanent Injunctions--Standards for their Imposition, Modification and Dissolution*, 66 Cornell L.Rev. 27, 63 (1980) (noting that the SEC resolves about 90 per cent of its cases by consent); 4 *Milgram on Trade Secrets* § 15.02 (Matthew Bender ed. 1996) ("Injunctive relief is the most commonly sought form of relief in trade secret litigation."); Allen H. Gerstein & Gregory C. Mayer, *The Federal Circuit Balancing Act: Preliminary Injunctions in Patent Cases*, *in* 1 *Patent Litigation* 603, 621-23 (Practising Law Institute ed.

(footnote cont'd)

ject of *Cooper v. Aaron*, 358 U.S. 1 (1958), presumably did not recite that it was "narrowly drawn," "extend[ed] no further than necessary to correct the violation of the Federal right," or was "the least intrusive means necessary to correct" that violation. Had Congress enacted a School Desegregation Litigation Reform Act after this Court's decision in *Cooper*, the district court would have had to hold new proceedings, make new findings, and enter a new injunction--notwithstanding this Court's clear prescription to proceed immediately with desegregation. Nor would that necessarily have been the end. Congress could then have added additional requirements, such as findings that the injunctive order was consistent with principles of comity and federalism, or with the retained sovereignty of the States; and it could have continued to add new demands requiring new proceedings, thereby perpetuating uncertainty and undermining the authority of the judiciary in a dangerous situation that required a definitive response.

1996) (noting that injunctions are common in patent litigation). In fact, there are many commercial enterprises whose identifiable intangible assets and good will include prospective restraints on others, e.g., agreements prohibiting a former employee from violating a non-competition clause. *See* American Institute of Certified Public Accountants, *Accounting Trends and Techniques* at 196-200 (50th ed. 1996) (surveying accounting of intangible assets, including non-competition agreements, as assets by large corporations). Such agreements are commonly enforced by injunctions. *See, e.g., JAK Productions, Inc. v. Wiza*, 986 F.2d 1088 (7th Cir. 1993).

To allow the decision below to stand will put all injunctions up for legislative grabs and thereby set the stage for re-creation of the very scenario this Court described in *Plaut*: "The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression." 514 U.S. at 219. If § 3626(b) is deemed constitutional, Congress will become the court of last resort for disappointed litigants who have the wherewithal to pursue legislative reversal in the guise of adjustment of federal court remedies.

II. 18 U.S.C. 3626(b) DEPRIVES LITIGANTS OF PROPERTY INTERESTS WITHOUT THE DUE PROCESS OF LAW.

Section 3626(b), in its retroactive application, destroys expectations freely bargained for and fixed in judicial judgment. ". . . [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Products*,

511 U.S. 244, 265 (1994). This principle finds expression in several constitutional sources, including the Ex Post Facto Clauses, the Takings Clause, the prohibition on bills of attainder, and the Due Process Clauses. *Id.*, 511 U.S. at 266.

Consistently with this principle, judgments have long been viewed as a form of property protected from governmental divestment:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases.

McCullough v. Virginia, 172 U.S. 102, 123-24 (1898); *accord*, *Hodges v. Snyder*, 261 U.S. 600, 603 (1923); *Memphis v. United States*, 97 U.S. 293, 296 (1877). *McCullough* remains good law. *See, e.g.*, *Johnston v. Cigna Corp.*, 14 F.3d 486, 490-91 (10th Cir. 1993), *cert. denied*, 514 U.S. 1082 (1995).

The court below summarily rejected this vested rights argument, stating: ". . . [T]he provisions of a consent decree that order prospective relief remain subject to modification or alteration for changes in law or circumstances. Such right as a litigant may have to prospective relief is thus neither final nor 'vested' in the constitutional sense." Appendix at 38a.

No decision of this court supports the proposition that a judgment's modifiability negates the vested rights doctrine, and at least one appeals court has explicitly rejected it: "On this view, there are no 'rights' of any kind and every decision fixing interests in property is forever malleable. We doubt the Supreme Court would take that view unless it is willing to overrule *Hodges*, *O'Grady*, and *Wheeling & Belmont Bridge* and jettison the doctrine." *Tonya K. v.*

Board of Education of Chicago, 847 F.2d 1243, 1248 (7th Cir. 1988) (Easterbrook, J.).[21] Certainly the enterprises that list agreements enforceable by injunction among their intangible assets would be surprised to hear that their interests are so evanescent. *See Accounting Trends and Techniques*, *supra*.

Property interests that are defeasible only under defined circumstances are common in the law. *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985) (holding that a public employee who could be fired for "misfeasance, malfeasance, or nonfeasance in office" nonetheless had a property right in his employment); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"). *Logan*, in particular, shows that the possibility of future loss or modification does not exclude an interest from the purview of due process, since it held that a cause of action--which a litigant has no guarantee of winning at all--is nonetheless "a species of property protected by the Fourteenth Amendment's Due Process Clause." 455 U.S. at 427 (emphasis added). Such contingencies do not rob a judgment of its character as property; they simply mean that the property interest has certain limitations, understood at the time it arises. It cannot be taken by government in a way that is inconsistent with those limitations or otherwise irrational.[22] *Cf. Eastern Enterprises v. Apfel*, 524 U.S.

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[21] The references are to *Hodges v. Snyder*, *supra*; *United States v. O'Grady*, 89 U.S. (22 Wall) 641 (1875); and *Wheeling Bridge II*, *supra*.

[22] In this connection, *Plaut* observes that "Rule 60(b), and the tradition that it embodies, would be relevant refutation of a claim that reopening a final judgment is *always* a denial of property without due process." 514 U.S. at 233 (emphasis added). We make no argument that such reopening *always*

498, ___, 118 S.Ct. 2131, 2153, 2158-60 (1998) (holding that retroactive imposition of a liability "not calibrated either to Eastern's past actions or to any agreement--implicit or otherwise--by the company" violated the Takings Clause; noting the similarity of takings and due process analysis).

Litigation rules that retrospectively change the consequences of past decisions may deny due process. *Newsweek, Inc. v. Florida Dept. of Revenue*, 522 U.S. 442 (1998) (holding that litigant who relied on availability of tax refund proceeding was denied due process when court ruled it should have sought a pre-payment remedy). More generally, litigation rules that operate irrationally to extinguish legal claims may deny due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. at 434-35 (holding that dismissing claim as untimely, where state agency had failed to act on jurisdictionally necessary administrative remedy within limitations period, denied due process).

Section 3626(b) presents a kind of arbitrariness just as obnoxious as those in *Newsweek* or *Logan*. Petitioners resolved their constitutional claims by consent under the law then applicable. The judgments--Petitioners' property--were understood to be terminable only under the equitable standards reflected in *Rufo* and *Dowell*. Section 3626(b), however, applies completely different standards to the continuation of the judgments, standards whose *retroactive* application denies plaintiffs any meaningful ability to act to protect their rights or to bargain for a different agreement that

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denies due process. Rather, reopening must be done consistently with "Rule 60(b), and the tradition that it embodies," rather than by retroactive legislative fiat.

would meet the new standards. Had Petitioners had notice when they settled the case that the § 3626(b) standards would be applied, they could have bargained for a very different agreement--for example, one that provided greater benefits for a shorter period of time,[23] or a private settlement agreement that is not barred or truncated by the PLRA.

There is nothing more irrational or arbitrary than changing the rules of litigation after the fact, when a party cannot take steps to protect his or her interests. When the result of such retroactive action is to extinguish a cause of action or, *a fortiori*, the more concrete property right embodied in a judgment, the government's action denies due process.

III. 18 U.S.C. § 3626(b) DENIES PETITIONERS THE EQUAL PROTECTION OF THE LAWS.

Section 3626(b), along with the rest of the PLRA, is a classic instance of class legislation directed at an unpopular group. This Court recently stated:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government *and each of its parts* remain open on impartial terms to all who seek its assistance. . . . A law declaring that in

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[23] As the panel put it, "In this respect, we note that at the time the Consent Decrees were entered into, each of the parties gave good and valuable consideration in exchange for what it received. Thus the detainees gave up their right to what could well have been immediate redress of constitutional violations, while the state conceded benefits that were perhaps not constitutionally mandated to gain time to make changes in its prison structure." Appendix at 135a n. 23.

> general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Romer v. Evans, 517 U.S. 620, 633 (1996) (emphasis added, citations omitted).

In *Romer*, the Court applied the rational basis test to strike down a referendum prohibiting legislative, executive or judicial action designed to protect lesbians, gay men and bisexuals from discrimination. It held that the resulting "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence." 517 U.S. at 633. The Court rejected Colorado's purportedly "legitimate" purpose for the amendment, namely, to protect other citizens' freedom of association, in particular those who have personal or religious objections to homosexuality, and to conserve resources to fight discrimination against other groups. 517 U.S. at 635.

Traditionally, rational basis scrutiny is highly deferential, upholding legislative classifications if there is any conceivable basis for them. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Citing *Heller*, the court below held:

> Plaintiffs fall far short of meeting their burden. The terms and legislative history of the Act make it clear that, in the unique context of litigation challenging prison conditions, . . . Congress adopted the remedial and termination provisions in order to promote, *inter alia*, principles of federalism and judicial restraint. The objective of limiting the grant or continuation of prospective relief in this context to no more than what is found necessary to remedy the violation of a federal right is unquestionably a legitimate one.

Appendix at 41a.

But this Court has engaged in a more critical analysis of the factual basis for government's purported justifications where the right burdened is particularly important, or a class is in particular need of protection. *Romer* is one example. Similarly, in *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), the Court struck down the requirement of a special use permit for homes for the mentally retarded, after a searching review of the city council's proffered reasons for requiring the permit. *Id.* at 449. The Court engaged in "precisely the sort of probing inquiry associated with heightened scrutiny," asking "whether policy decisions are squarely supported by a firm factual foundation." *Id.* at 458 (Marshall, J., concurring in part and dissenting in part). In *Plyler v. Doe*, 457 U.S. 202, 224 (1982), this Court found Texas' exclusion from school of illegal aliens' children "c[ould] hardly be considered rational" after examining the reasons proffered for it to see if they furthered a substantial state goal.

The use of heightened rational basis scrutiny is appropriate here, as it was in *Romer*, where the legislature is attempting to burden a disfavored--though not suspect--class's ability to employ the remedial mechanisms of society to protect itself and its constitutional rights. Petitioners' argument is indeed more compelling than that in *Romer*, since prisoners in this society are in practice without a voice, and in most cases without a vote. As in *Cleburne*, the court must examine Congress's proffered neutral goals of federalism and judicial restraint and determine whether it is "rational" to apply them *only* to prisoners. 473 U.S. at 449.

Since Congress's professed concerns apply to litigation on behalf of groups other than prisoners, such as litigants challenging school segregation or practices in public housing and institutions for the men-

tally ill and developmentally disabled, *see, e.g.*, *Dowell*, 498 U.S. at 248; *Missouri v. Jenkins*, 515 U.S. 70, 132-33 (1995) (Thomas, J., concurring) (equating courts running school systems with courts running prisons), but § 3626(b) targets only prisoners, this Court should grant review and hold that § 3626(b) is not rationally related to a legitimate government interest.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Dated: New York, New York
June 17, 1999

Respectfully submitted,

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[CORRECTED COPY]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1996

(Argued *en banc*: February 25, 1998

Decided: March 23, 1999)

Docket No. 96-7957

JAMES BENJAMIN *et al.*,

Plaintiffs-Appellants,

—v.—

MICHAEL JACOBSON, Commissioner of the Department of Correction of the City of New York, *et al.*,

Defendants-Appellees.

Before:

WINTER, *Chief Judge*, and OAKES, KEARSE, WALKER, MCLAUGHLIN, JACOBS, LEVAL, CALABRESI, CABRANES, and PARKER, *Circuit Judges*.

Rehearing *en banc* of an appeal from an order of the United States District Court for the Southern District of New York, Harold Baer, Jr., *Judge*, upholding constitutionality of immediate termination provision of Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626(b)(2) (Supp. II 1996), and vacating consent decrees. *See* 935 F. Supp. 332 (1996).

Affirmed as to constitutionality, reversed as to vacatur of consent decrees, and remanded for further proceedings to determine whether any forward-looking provisions of the consent decrees should be continued.

Judge Jacobs concurs in the majority opinion, and files a separate opinion joined by Chief Judge Winter and Judges Kearse, Walker, McLaughlin, Cabranes, and Parker.

Judge Leval concurs in all but Part II.A. of the majority opinion, and files a separate opinion joined by Judge Oakes and joined in part by Judge Calabresi.

Judge Calabresi concurs in the result, and files a separate opinion.

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DENNIS C. VACCO, Attorney General of the State of New York, Albany, New York (Peter H. Schiff, Deputy Solicitor General, Martin A. Hotvet, Assistant Attorney General, Albany, New York; Bill Pryor, Attorney General, State of Alabama, Montgomery, Alabama; Grant Woods, Attorney General, State of Arizona, Phoenix, Arizona; Richard Blumenthal, Attorney General, State of Connecticut, Hartford, Connecticut; M. Jane Brady, Attorney General, State of Delaware, Wilmington, Delaware; Robert A. Butterworth, Attorney General, State of Florida, Tallahassee, Florida; Thurbert E. Baker, Attorney General, State of Georgia, Atlanta, Georgia; Gus F. Diaz, Acting Attorney

General, Territory of Guam, Agana, Guam; Margery S. Bronster, Attorney General, State of Hawaii, Honolulu, Hawaii; James E. Ryan, Attorney General, State of Illinois, Chicago, Illinois; Thomas J. Miller, Attorney General, State of Iowa, Des Moines, Iowa; Carla J. Stovall, Attorney General, State of Kansas, Topeka, Kansas; Richard P. Ieyoub, Attorney General, State of Louisiana, Baton Rouge, Louisiana; J. Joseph Curran, Jr., Attorney General, State of Maryland, Baltimore, Maryland; Scott Harshbarger, Attorney General, Commonwealth of Massachusetts, Boston, Massachusetts; Frank J. Kelley, Attorney General, State of Michigan, Lansing, Michigan; Mike Moore, Attorney General, State of Mississippi, Jackson, Mississippi; Joseph P. Mazurek, Attorney General, State of Montana, Helena, Montana; Don Stenberg, Attorney General, State of Nebraska, Lincoln, Nebraska; Frankie Sue Del Papa, Attorney General, State of Nevada, Carson City, Nevada; Philip T. McLaughlin, Attorney General, State of New Hampshire, Concord, New Hampshire; Tom Udall, Attorney General, State of New Mexico, Santa Fe, New Mexico; Betty D. Montgomery, Attorney General, State of Ohio, Columbus, Ohio; D. Michael Fisher, Attorney General, Commonwealth of Pennsylvania, Harrisburg, Pennsylvania; Jeffrey B. Pine, Attorney

General, State of Rhode Island, Providence, Rhode Island; Jan Graham, Attorney General, State of Utah, Salt Lake City, Utah; Mark F. Earley, Attorney General, Commonwealth of Virginia, Richmond, Virginia; and James E. Doyle, Attorney General, State of Wisconsin, Madison, Wisconsin, of counsel), *filed a brief for Amici Curiae States of New York, Alabama, Arizona, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Rhode Island, Utah, and Wisconsin, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the Territory of Guam, in support of Defendants-Appellees.*

KEARSE, *Circuit Judge*, with whom Chief Judge WINTER, and Judges WALKER, MCLAUGHLIN, JACOBS, CABRANES, and PARKER join, and with whom Judges OAKES and LEVAL join except for Part II.A.:

Plaintiffs James Benjamin *et al.*, who are pretrial detainees, appealed from an order of the United States District Court for the Southern District of New York, Harold Baer, Jr., *Judge*, entered pursuant to the Prison Litigation Reform Act of 1995 ("PLRA" or the "Act"), Pub L. No. 104-134, 110 Stat. 1321-66 §§ 801-810 (1996), *codified at* 18 U.S.C. § 3626 (Supp. II 1996); *see*

also 18 U.S.C.A. §§ 3626(b)(3), (e)(2), (e)(3) (West Supp. 1998), vacating certain consent decrees entered in 1978 and 1979 (the "Consent Decrees" or the "Decrees") in actions brought by classes of pretrial detainees against defendant officials of the City of New York (collectively the "City") to challenge the conditions of confinement of persons held in City institutions awaiting trial or other disposition of criminal charges. The district court rejected plaintiffs' challenges to the constitutionality of the PLRA's provision requiring the termination of consent decrees not meeting criteria set by the Act, vacated the Consent Decrees, and dissolved the injunctions that had been entered pursuant to the Decrees. *See Benjamin v. Jacobson*, 935 F. Supp. 332 (1996) ("*Benjamin I*"). A unanimous panel of this Court upheld the district court's rejection of the constitutional challenges but reversed the vacatur of the Decrees, ruling that the Act does not call for the termination of consent decrees not meeting the requirements of the Act, but merely limits the power of federal courts to enforce those decrees and leaves the decrees intact and enforceable in state courts. *See Benjamin v. Jacobson*, 124 F.3d 162 (1997) ("*Benjamin II*"). On *en banc* reconsideration, we conclude that the PLRA requires the termination of consent decrees that do not meet the criteria established by the Act; that that provision does not violate the constitutional principle of separation of powers or infringe the due process, equal protection, and other constitutional rights invoked by plaintiffs; and that plaintiffs should be afforded an opportunity to show that, under the Act's criteria, the continuation of prospective relief is warranted. We therefore vacate the decision of the panel; we affirm in part and reverse in part the order of the district court and remand for further proceedings.

I. BACKGROUND

This action comprises seven related class actions brought during the mid-1970s by pretrial detainees in certain New York City jails, alleging that conditions of their confinement violated their constitutional rights. *See Benjamin v. Malcolm*, 75 Civ. 3073 (S.D.N.Y.) (Rikers Island House of Detention for Men, now called the James A. Thomas Center); *Forts v. Malcolm*, 76 Civ. 101 (S.D.N.Y.) (Rikers Island Correctional Institution for Women, now called the Rose M. Singer Center); *Ambrose v. Malcolm*, 76 Civ. 190 (S.D.N.Y.) (Bronx House of Detention for Men); *Maldonado v. Ciuros*, 76 Civ. 2854 (S.D.N.Y.) (Rikers Island Adolescent Reception and Detention Center); *Detainees of the Brooklyn House of Detention for Men v. Malcolm*, 79 Civ. 4913 (E.D.N.Y.); *Detainees of the Queens House of Detention for Men v. Malcolm*, 79 Civ. 4914 (E.D.N.Y.); *Rosenthal v. Malcolm*, 74 Civ. 4854 (S.D.N.Y.) (Rikers Island Adult Mental Health Unit). The Consent Decrees were designed "to ensure that prison conditions became and remained safe and humane." *Benjamin I*, 935 F. Supp. at 337. The Decrees, *inter alia*,

> ensure that detainee mail and property are handled properly, and that procedures in concert with constitutional protections are followed during detainee cell and body searches. On an institutional level, the Consent Decrees seek to maintain the physical plant of the jails in a condition safe for human habitation. They mandate that attention be given to vermin and insect control, sanitation, maintenance and refuse removal. Other provisions govern food services to the detainees and ensure that the detainees are adequately fed while in custody, with food that is prepared and served in a sanitary environment.

Id. As noted in *Benjamin II*, "[t]hese decrees have generated a judicially administered structure comprising over ninety related court orders and extending to more than thirty discrete areas of prison administration." 124 F.3d at 165.

A. *The PLRA and the Proceedings in the District Court*

Effective April 26, 1996, Congress enacted the PLRA which, *inter alia*, provides that in civil actions arising under federal law challenging conditions in prisons (including pretrial detention facilities) "prospective relief" may not be granted in the absence of certain findings:

> [p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A). With respect to judgments entered prior to the effective date of the PLRA, the Act provides for the termination of prospective relief that was ordered without the court having made these findings as to need, narrowness, and intrusiveness:

> IMMEDIATE TERMINATION OF PROSPECTIVE RELIEF.—In any civil action with respect to prison

> conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

Id. § 3626(b)(2) ("termination provision"). However, the Act provides that even if the need-narrowness-intrusiveness findings had not been made in connection with the entry of the decree, the prospective relief is not to be terminated

> if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

18 U.S.C.A. § 3626(b)(3) (West Supp. 1998), *as amended and made applicable to all pending cases, see* Pub. L. No. 105-119, § 123(a)(2) & (b), 111 Stat. 2440, 2470 (Nov. 26, 1997) (changing "current or ongoing" to "current and ongoing").

In the Act, "the term 'prospective relief' " is defined to "mean[ ] all relief other than compensatory monetary damages," 18 U.S.C. § 3626(g)(7), and " 'relief' means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements," *id.* § 3626(g)(9). The term "private settlement agreement" is defined to "mean[ ] an agreement entered into among the parties

that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled," *id.* § 3626(g)(6); the term "consent decree" is defined to "mean[ ] any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlement agreements," *id.* § 3626(g)(1).

Shortly after the PLRA's effective date, the City moved for the immediate termination of the Consent Decrees and related orders on the ground that the Decrees had been entered without the need-narrowness-intrusiveness findings required by the PLRA. Plaintiffs conceded that no such findings had been made and that the requisite findings would not be supported by the record in its present state; but they challenged the constitutionality of the Act as applied to existing consent decrees, arguing principally that it violates the constitutional principle of separation of powers and denies them equal protection and due process. In support of their separation of powers contention, plaintiffs argued that the Act requires the reopening of final judgments and thereby exceeds Congress's power as elucidated in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) ("*Plaut*"), and impermissibly prescribes a rule of decision without changing the underlying substantive law, contrary to the principle established in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). They also argued that the Act impermissibly deprives the federal courts of their Article III power to remedy violations of constitutional rights. Plaintiffs requested an opportunity, if the court rejected their constitutional arguments, to create a factual record as to the current conditions in City detention facilities in order to permit the court to make the findings required by 18 U.S.C.A. § 3626(b)(3) (West

Supp. 1998) for the continuation of the injunctive relief granted by the Consent Decrees. The United States intervened in the action in order to defend the constitutionality of the Act. *See* 28 U.S.C. § 2403(a).

In *Benjamin I*, the district court upheld the constitutionality of the Act's termination provision and granted the City's motion. *See* 935 F. Supp. at 358. The court reasoned that the Act does not violate the principle barring Congress from reopening final judgments because a consent decree calling for continued compliance with prescribed standards is not a final judgment in the same sense in which a judgment for monetary relief would be final:

> Where the suit is an action at law for damages and the judgment has become final for *res judicata* purposes, the judgment is no longer subject to congressional enactments. *See Plaut*, [514 U.S. at 225-26]. Where the judgment imposes an executory decree, though, and the court retains supervisory jurisdiction, the judgment's prospective effects are not final for separation-of-powers purposes.

Benjamin I, 935 F. Supp. at 345. The district court viewed "the Consent Decrees [as] executory judgments with prospective effects," and noted that they "impose[d] injunctive relief over which this Court has retained supervisory jurisdiction." *Id.* at 347. The court concluded that the Decrees were subject to alteration by Congress without infringing the principle announced by *Plaut*.

The district court also found no violation of the principle enunciated in *United States v. Klein*. It reasoned that "while Congress did not amend the substantive law with respect to permissible prison conditions," it also did

not prescribe a substantive rule of decision but merely "change[d] the law governing the district court's remedial powers." *Benjamin I*, 935 F. Supp. at 350. The court also rejected the suggestion that the PLRA prevented the courts from effectively remedying violations of constitutional rights. It observed that the Act allows the courts, on the condition that they make the requisite findings as to relief, to "continue to define the scope of prisoners' constitutional rights, review the factual record, apply the judicially determined constitutional standards to the facts as they are found in the record and determine what relief is necessary to remedy the constitutional violations." *Id.* at 351.

The district court rejected plaintiffs' due process arguments, reasoning that because the Consent Decrees were not "final" with respect to future conditions, plaintiffs had no vested rights in their continued enforcement. *See id.* at 356. The court rejected the equal protection arguments, noting that prisoners are not a suspect class and stating, *inter alia*, that the Act was "supported by plausible legitimate government interests and the means chosen to advance these goals are rationally designed." *Id.* at 354.

The court also denied plaintiffs' request for an opportunity to present evidence as to the need for continuation of the prospective relief provided for in the Decrees. It stated that "[t]he statute provides for 'immediate termination' and based on the current record before the Court, the defendants are entitled to vacatur of the Consent Decrees." *Id.* at 357. The court entered an order stating that "the Consent Decrees in these cases are VACATED pursuant to 18 U.S.C. § 3626(b)(2)." 935 F. Supp. at 358.

Plaintiffs promptly asked the court to, *inter alia*, rescind its vacatur of the Consent Decrees pending a hearing as to the existence of continuing violations. They argued that because of the course, complexity, and time-pressures of the litigation, they had not had an opportunity to present such evidence. In the alternative, plaintiffs asked the court to certify questions of the Act's interpretation and constitutionality for an immediate appeal and to stay its ruling pending appeal. The court denied the motions for rescission and a hearing but granted the motion for a stay until such time as a stay pending appeal could be sought from this Court.

Plaintiffs promptly appealed, and this Court granted motions for an expedited appeal and a stay.

B. *The Panel Decision*

Plaintiffs pursued their constitutional challenges to the PLRA on appeal. In *Benjamin II*, the panel unanimously affirmed the district court's rejection of the constitutional challenges to the termination provision, albeit on different reasoning, and it reversed the vacatur of the Consent Decrees. The panel based its conclusions on its view that the Act does not require the termination of consent decrees entered without the mandated need-narrowness-intrusiveness findings; rather the panel concluded that the Act merely prohibits *federal* courts from enforcing such decrees and leaves parties free to seek enforcement of the consent decrees in state courts.

The panel began by noting that the PLRA had been enacted in part to answer the criticism that federal courts had overstepped their authority in the context of prison litigation. After quoting § 3626(b)(2)'s provision for "the immediate termination of any prospective relief if the relief was approved or granted in the absence of" the

specified need-narrowness-intrusiveness findings, the panel stated as follows:

> This language can be read in either one of two ways, each of which, if constitutionally valid, would respond to the criticisms that led to the PLRA. The first interpretation would limit the jurisdiction of federal courts so that these courts could not in the future enforce past consent decrees, except insofar as the decrees were found to be tailored to a federal right. The second would render null and void all past federally approved prison consent decrees unless these decrees met the requirement of being narrowly tailored to a federal right. . . .
>
> The correct reading of the section turns on the meaning of the words "termination of prospective relief." If "prospective relief" includes the past Decrees themselves, then these are terminated and annulled under the law. If, instead, "termination of prospective relief" means that no future relief—that is neither future enforcement nor articulation—is available in federal courts under past Decrees, then the Decrees remain valid, but no longer subject to federal jurisdiction.
>
> At a glance, the second interpretation seems plausible. The statute defines "prospective relief" as "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7). It also states that "the term 'relief' means all relief in any form that may be granted or approved by the court, and *includes consent decrees* but does not include private settlement agreements." 18 U.S.C. § 3626(g)(9) (emphasis added). One could, therefore, maintain that "prospective relief" includes the Decrees because (1) "prospective relief" includes all relief

except damages, (2) "relief" includes "consent decrees," and (3) consent decrees are not damages.

But, in fact, such a reading has significant linguistic problems. Taken literally, it would imply that the word "relief," without more, includes within it "private settlement agreements." Yet it would be a remarkable twisting of language to describe a contract or an agreement as a form of relief. We simply do not talk that way. The ordinary way of talking and writing is to speak of relief *available under or pursuant to* a private settlement agreement. Since it is clear that private settlement agreements are not a form of relief, why does the definition expressly exclude them? Under the circumstances, it makes more sense to read the definitional phrase as saying "the term 'relief' means all relief in any form that may be granted or approved by the court, and includes [all relief granted pursuant to] consent decrees but does not include [relief granted pursuant to] private settlement agreements." While one can define anything to mean anything, courts should be reluctant to read a definitional sentence to mean something that makes another part of the same sentence meaningless or completely superfluous.

124 F.3d at 166-67 (emphases and brackets in original). The panel found that its second hypothesized interpretation (*i.e.*, that the Act requires annulment of past federal consent decrees not narrowly tailored to the vindication of a federal right) created serious separation of powers problems, for "[u]nder the second interpretation, the termination provision will strip the plaintiffs of all of the protections they negotiated into the Consent Decrees

except for those narrowly tailored to federal rights." *Id.* at 168.

Instead, reasoning that "federal consent decrees are not only federal court judgments but also, and separately, contracts arising under state law," the panel adopted its first interpretation (*i.e.*, that the PLRA simply eliminates the federal courts' enforcement jurisdiction), concluding that the "underlying contract, in its time made into a judgment, is left untouched." *Id.* at 178. The panel concluded that the PLRA "simply force[s] the plaintiffs to seek redress for the non-federal aspects of the Decrees in state court as opposed to federal court." *Id.* at 168.

The panel also concluded that in light of its interpretation that the Act "does not annul the underlying Decrees, but, instead, only changes the forum in which they can be enforced," *id.* at 174, plaintiffs' constitutional challenges should be rejected. *See, e.g.*, *id.* at 170, 173, 174, 176-77 (separation of powers); *id.* at 176 (due process); *id.* at 177 n.18 (due process and equal protection).

In sum, the panel concluded that "the non-federal aspects of the Consent Decrees are hereafter not to be enforced by the federal courts," but that the plaintiffs "should be able to get all the relief from state courts, including specific performance, that had previously been available to them federally under the Consent Decrees." *Id.* at 178. "[W]hile the defendants may be entitled to immediate termination of prospective relief from the *federal* courts, there is nothing to prevent the plaintiffs from seeking the enforcement of the Consent Decrees in *state* courts." *Id.* at 165 (emphases in original). In light of its conclusion that prospective relief entered without the required need-narrowness-intrusiveness findings need not be terminated, and that the Act merely requires

that enforcement of that relief be sought in state court, the panel reversed the district court's vacatur of these Consent Decrees and ruled that plaintiffs are entitled, at their option, to have an evidentiary hearing in the district court on their allegations of current and ongoing violations of federal rights or to "seek enforcement of the Decrees in their entirety in state court." *Id.* at 180.

C. *Rehearing* En Banc

The City petitioned for rehearing, with a suggestion for rehearing *en banc*, arguing principally that the panel had misinterpreted the PLRA, and in doing so had "vitiate[d] the redress that Congress sought to provide to overburdened states and municipalities by transforming a statute intended to protect defendants from extra-constitutional burdens into one that ensures the perpetuation of those burdens via the state courts." (City Petition for Rehearing at 3.) In December 1997, we agreed to rehear the appeal *en banc*.

On rehearing, plaintiffs contend principally (1) that *Benjamin II*'s construction of the PLRA as terminating only the Decrees' enforceability in federal, not state, court, was correct, and (2) that this Court should nonetheless conclude that the Act's termination provision violates Article III of the Constitution and the principle of separation of powers, and that application of the termination provision to the Decrees denies them due process and equal protection. They also urge, if the Act's termination provision is upheld, that they be given a meaningful opportunity to present evidence to the district court that the Decrees should be continued.

The City disagrees with *Benjamin II*'s interpretation of the PLRA. It argues that the district court's decision upholding the constitutionality of the PLRA and vacat-

ing the Decrees was correct, and it urges that the order of the district court be affirmed. The State of New York has filed a brief on behalf of itself and numerous other States as *amici curiae*, supporting the position of the City. The United States, as intervenor, has filed a brief arguing that the Act is not unconstitutional, that the panel opinion in *Benjamin II* should be reversed to the extent that it does not uphold the PLRA as written, and that the matter should be remanded to the district court for further proceedings to determine the need for continuation of the future relief ordered in the Decrees.

For the reasons that follow, we conclude that the Act provides for the termination, though not the annulment, of consent decrees that do not meet the need-narrowness-intrusiveness criteria established by the Act; that plaintiffs' constitutional challenges to the termination provision were properly rejected; and that plaintiffs were entitled to an opportunity to show, in accordance with the Act, that any or all of the prospective relief ordered by the Decrees should be continued. We therefore vacate the panel decision, affirm the district court's rejection of plaintiffs' constitutional challenges, reverse the district court's vacatur of the Consent Decrees, and remand for further proceedings.

II. INTERPRETATION OF THE PLRA

A. *The Scope of the PLRA's Termination Provisions*

The PLRA sets limitations on, *inter alia*, the power of the courts to continue certain forward-looking relief in civil actions challenging conditions in prisons or pretrial detention facilities. It provides, in pertinent part, as follows:

(b) TERMINATION OF RELIEF.—

. . . .

(2) IMMEDIATE TERMINATION OF PROSPECTIVE RELIEF.—In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) LIMITATION.—Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

. . . .

(c) SETTLEMENTS.—

(1) CONSENT DECREES.—In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

(2) PRIVATE SETTLEMENT AGREEMENTS.—(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agree-

ment are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

18 U.S.C. §§ 3626(b)(2), (c); 18 U.S.C.A. § 3626(b)(3) (West Supp. 1998).

The most pertinent terms used in these provisions are defined in the Act as follows:

(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

. . . .

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

. . . .

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and

includes consent decrees but does not include private settlement agreements.

18 U.S.C. §§ 3626(g)(1), (5), (6), (7), (9).

In interpreting a Congressional enactment, we generally assume that the ordinary meaning of language used in the statute accurately expresses Congress's purpose, unless the statute contains a contrary indication. *See, e.g., FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990). If the statute includes an explicit statutory definition, we accord that definition controlling weight, *see, e.g., Meese v. Keene*, 481 U.S. 465, 484 (1987), even if it varies from common usage, *see, e.g., Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 502 (1945).

The PLRA's termination provision affects only "prospective relief." In order to determine whether that provision is meant to be applied to consent decrees, therefore, we look to the Act's explicit definition of prospective relief and, as necessary, to the definitions of the terms to which that definition refers. The definition of "prospective relief" does not refer *in haec verba* to consent decrees but states simply that prospective relief is any "relief" other than compensatory monetary damages. The definition of relief, however, expressly "includes consent decrees." 18 U.S.C. § 3626(g)(9). This inclusion is reinforced by the definition of the term "consent decree" itself, which "means [consensual court-ordered] relief." *Id.* § 3626(g)(1). These definitions make it doubly plain that a consent decree, to the extent that it awards a remedy other than compensatory monetary damages, constitutes prospective relief within the meaning of the Act. We thus conclude that the termination provision applies to consent decrees.

The *Benjamin II* panel reached the opposite conclusion principally because the definition of "relief" also expressly excludes "private settlement agreements," an exclusion the panel found superfluous because one does not ordinarily characterize an agreement as relief. We share the panel's view that this is not a natural characterization; nor do we think it entirely natural to characterize a consent decree itself, as contrasted with the decretal provisions it contains, as relief. The awkwardness in this instance does not, however, obscure Congress's intent. In defining relief to exclude private settlement agreements (*i.e.*, agreements that are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled), Congress simply excluded those agreements from the governmental obligations that must be based on need-narrowness-intrusiveness findings, and hence preserved them from termination.

Congress may, of course, choose to formulate its enactments in any of a number of ways. It might, for example, state *in haec verba* that "A, B, C, and D are prohibited." Or it might state simply that "X is prohibited," and define "X" to mean "A, B, C, or D." The scope of both statutory prohibitions would be the same. Congress's selection of the definitional structure for the PLRA, stating that the court must terminate "prospective relief" not supported or supportable by need-narrowness-intrusiveness findings, and defining prospective relief to include consent decrees but to exclude private settlement agreements, is the equivalent of a provision stating that the court is to terminate consent decrees as to which need-narrowness-intrusiveness findings have not been and cannot be made, but it is not to terminate private settlement agreements even if such findings could not be

made. We think it clear from the statutory terms distinguishing between consent decrees and private settlement agreements that Congress intended to free governments from judicial constraints not based on need-narrowness-intrusiveness findings, but not to relieve them of their private contractual obligations—however broad—that are not judicially ordered.

We do not see any basis for inferring that Congress meant federal consent decrees that are not based on need-narrowness-intrusiveness findings to remain in effect and amenable to enforcement in state courts. It seems implausible that Congress meant to forbid a federal court to enforce these federal judgments but to allow them to be enforceable in a state court, and the language of the Act is contrary to any suggestion that a decree not supported by the mandated findings is to be allowed to remain in effect. Although the word "termination" is not defined in the Act, its ordinary meaning is the antithesis of continuation.

We also note our disagreement with the *Benjamin II* panel's view that federal consent decrees not supported by the mandated findings remain enforceable in state courts on the theory that settlement agreements are both private agreements and consent decrees. An agreement leading to a consent decree is normally conditional, setting out actions and forbearances to which the defendant agrees and stating that the settlement is conditioned on being so-ordered by the court. *See, e.g., Benjamin v. Malcolm*, 75 Civ. 3073 (S.D.N.Y. Nov. 29, 1978) (Stipulation for Entry of Partial Final Judgment at 1 ("IT IS HEREBY STIPULATED by and between the undersigned attorneys for the plaintiffs and the defendants herein, and *subject to approval by the Court*" (emphasis added))). A plaintiff willing to settle constitutional

claims by way of a consent decree seeks the assurance that, if the defendant fails to fulfill its agreed obligations, those obligations will be enforceable through the court's exercise of its contempt power. We are not aware of any practice whereby the plaintiffs, especially in institutional litigation involving constitutional claims for injunctive relief, agree to a consent decree and also agree—either in the same document or in a separate document—to give up their claims unconditionally in exchange for undertakings by the defendants that would not be enforceable except through the commencement of a new lawsuit for breach of contract.

Where the parties have made an agreement to settle conditional on approval by the federal court, there is no enforceable agreement if the condition fails. The parties may of course enter into an agreement that is not conditioned on such approval, but that would be a different agreement from an accord envisioning a consent decree. The court's approval of any judgment, whether litigated or consensual, is of course subject to change if the conditions underlying the judgment change. *See, e.g., System Federation No. 91, Railway Employes' Department, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961) ("*System Federation*") ("court will not continue to exercise its powers [ ]under [a consent decree] when a change in law or facts has made inequitable what was once equitable"); Fed. R. Civ. P. 60(b)(5) ("court may relieve a party . . . from a final judgment . . . [on a showing that] . . . it is no longer equitable that the judgment should have prospective application").* And if the federal

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* So far as we are aware, none of the consent decrees at issue in the present cases contains any concessions of federal rights by class representatives for the prisoners. If there were such concessions, the district court would have the power to relieve the parties if such concessions became inequitable.

court, though having once approved, withdraws its approval and terminates prospective relief, the condition upon which the parties agreed to bind themselves will have failed. In such circumstances, we see no basis, consistent with fundamental principles of contract law or with the Supremacy Clause of the Constitution, on which a state court would have the power to reinstate obligations originally imposed in the federal consent decree but terminated by the federal court.

Nor, given the Act's definitions, does it appear that Congress thought federal consent decrees would simultaneously be private settlement agreements. A consent decree is defined as relief "entered by the court," 18 U.S.C. § 3626(g)(1), and it is well established that a federal court ordinarily has the power to enforce its own orders and judgments, *see, e.g., Peacock v. Thomas*, 516 U.S. 349, 356-57 (1996); *Shillitani v. United States*, 384 U.S. 364, 370 (1966). A private settlement agreement, in contrast, is defined as relief that is "not subject to judicial enforcement." 18 U.S.C. § 3626(g)(6). Given these definitions, it appears that Congress sought to make the Act's concepts of consent decrees and private settlement agreements mutually exclusive.

We note also that the Act, in contrasting the treatment to be given to private settlement agreements, specifies that those agreements are enforceable "in State court." *Id.* § 3626(c)(2)(B). The absence of any similar statement indicating state-court enforceability of federal consent decrees reinforces our view that Congress meant the Act to require the termination of consent decrees that are not supportable by need-narrowness-intrusiveness findings and not simply to make such decrees unenforceable by federal courts but enforceable by state courts. Certainly given the goal of relieving governmental entities

of judicially ordered burdens that "extend . . . further than necessary" to remedy a federal violation, *id.* § 3626(a)(1)(A), it would seem anomalous for Congress simply to transfer judicial enforcement of unnecessary relief from one forum to another.

In sum, the Act explicitly requires the "immediate termination of any prospective relief" that was approved or granted in the absence of the specified need-narrowness-intrusiveness findings. *Id.* § 3626(b)(2). Since prospective relief, under the set of definitions provided in the Act, includes a consent decree to the extent that the decree does not award compensatory monetary damages, we think it clear from the statute itself that, if those findings were not made in connection with the entry of the decree, *see id.*, and if the court does not proceed to make the requisite findings that prospective relief remains necessary to correct a current and ongoing violation of a federal right, *see* 18 U.S.C.A. § 3626(b)(3) (West Supp. 1998), the Act requires the termination of such a consent decree.

Although we view the language of the Act as sufficiently clear not to require resort to legislative history for explanation, *see, e.g.*, *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (in resolving question of Congress's intent, "we look first to the statutory language and then to the legislative history if the statutory language is unclear"), we note that the history of the Act confirms our interpretation that the Act calls for the termination of consent decrees that lack the requisite need-narrowness-intrusiveness foundation. A Congressional conference report describing the termination provision of a predecessor bill that was virtually identical to the termination provision that was eventually included in the PLRA stated that "*[p]rior consent decrees are made terminable* upon

the motion of either party, and can be continued only if the court finds that the imposed relief is necessary to correct the violation of the federal right." H.R. Conf. Rep. No. 104-378, at 166 (1995) (emphasis added). Similarly, an earlier predecessor bill, H.R. 667, 104th Cong. (1995), would have required the immediate termination of any prospective relief and defined "relief" to include consent decrees. The House of Representatives Judiciary Committee Report on H.R. 667 stated that the termination provision "allows a jurisdiction that is already subject to an existing federal consent decree that was entered with no finding of any constitutional violation, to move to *terminate that decree*." H.R. Rep. No. 104-21, at 26 (1995) ("House Report") (emphasis added). The House Report also explained that the relevant section would

> limit[ ] the remedial scheme a court may order or approve to the least intrusive remedy . . . . [and would] reasonably and permissibly limit[ ] the use of court-enforced consent decrees to resolve prison conditions suits, while freely allowing the use of private settlement agreements.

Id. at 24-25.

In sum, we agree with the conclusions of the First Circuit in *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998), that although the definition of consent decrees as "relief" "contradicts conventional" usage, the Act, when "[r]ead literally, . . . requires termination of the consent decree itself," *id.* at 654, and that the language of the Act, read literally, accurately reflects the intent of Congress. Accordingly, we reject the *Benjamin II* panel's view that the Act does not require that consent decrees unsup-

portable by need-narrowness-intrusiveness findings be terminated.

B. *The Meaning of "Termination"*

We also, however, reject the view of the district court that, if a consent decree was entered without the requisite need-narrowness-intrusiveness findings, the Act requires that the decree be vacated. The Act states that such decrees are to be "terminat[ed]"; it does not speak of vacatur or use the term "vacate." There is a potentially significant difference between the terms, and we see no basis for assuming that Congress thought the two interchangeable. As the First Circuit observed,

> Nothing in the PLRA or its legislative history speaks of vacating consent decrees. Congress chose to use the verb "terminate" and to eschew the verb "vacate." The distinction between these two words is clear: "terminate" means "to put an end to" or "to end," *Black's Law Dictionary* at 1471 [(6th ed. 1990)], whereas "vacate" means "to annul" or "to render . . . void," *id.* at 1548.
>
> In the present context, this distinction may well possess practical significance. . . . While terminating a consent decree strips it of future potency, the decree's past puissance is preserved and certain of its collateral effects may endure. Vacating a consent decree, however, wipes the slate clean, not only rendering the decree sterile for future purposes, but also eviscerating any collateral effects and, indeed, casting a shadow on past actions taken under the decree's imprimatur. . . . [N]othing in the PLRA even hints that consent decrees must be vacated when prospective relief is terminated . . . .

Inmates of Suffolk County Jail v. Rouse, 129 F.3d at 662.

We likewise see no indication in the Act itself or in its legislative history that Congress meant past consent decrees to be annulled and stripped of all past significance or collateral effect. Accordingly, we conclude that the Act requires only that consent decrees not supportable by need-narrowness-intrusiveness findings be terminated, not vacated.

III. THE CONSTITUTIONAL CHALLENGES

Plaintiffs contend that when the Act is read to require termination of consent decrees, it is unconstitutional in several respects. They contend principally that the termination provision violates the separation of powers principle of the Constitution by requiring the courts to reopen final judgments and violates Article III by stripping the courts of their power and duty to fashion adequate remedies in constitutional cases. We note that plaintiffs have not, in this *en banc* rehearing, renewed their contention that the termination provision violates the principle enunciated in *United States v. Klein*; accordingly, that contention is no longer before this Court. Plaintiffs also argue that the application of the Act's termination provision to the Decrees would violate their rights to due process and equal protection. We reject all of their contentions.

A. *Separation of Powers*

The Constitutional principle of separation of powers protects each of the three Branches of the federal government from encroachment by either of the other Branches. Article III of the Constitution "establishes a 'judicial department' with the 'province and duty . . .

to say what the law is' in particular cases and controversies." *Plaut*, 514 U.S. at 218 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The separation of powers "serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 848 (1986) (internal quotation marks omitted).

In *Plaut*, the Supreme Court established that one facet of the separation of powers principle prevents Congress from requiring the courts to reopen final judgments. At issue in *Plaut* was a then-recently-enacted statutory provision dealing with statutes of limitations in civil actions brought to enforce the federal securities laws. The *Plaut* plaintiffs had previously commenced a federal securities fraud action seeking money damages; when commenced, their action was timely under the then-applicable statute of limitations. While their suit was pending, however, the Supreme Court in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991), ruled that such actions were subject to a shorter limitations period. Under that ruling, the *Plaut* plaintiffs' claims were dismissed as time-barred; the plaintiffs did not appeal, and the judgment dismissing their case became final. Thereafter, Congress passed a statute purporting to reinstate actions that had been dismissed under *Lampf* but that would have been timely had the prior limitations period been applied.

The Court ruled that because the dismissal of the *Plaut* plaintiffs' action had become final before the new legislation went into effect, Congress had "exceeded its

authority by requiring the federal courts to exercise [t]he judicial Power . . . in a manner repugnant to the text, structure and traditions of Article III." *Plaut*, 514 U.S. at 217-18 (internal quotation marks omitted). The Court stated that Article III

> gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments." Easterbrook, Presidential Review, 40 Case W.Res.L.Rev. 905, 926 (1990). By retroactively commanding the federal courts to reopen final judgments, Congress . . . violate[s] this fundamental principle.

Plaut, 514 U.S. at 218-19.

> Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.

Id. at 227 (emphasis in original).

"Finality," however, may be defined differently for different purposes, and the *Plaut* Court distinguished the judgment at issue before it, which dismissed a complaint seeking money damages, from other types of judgments. Making particular reference to the decision in *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) ("*Wheeling Bridge II*"), *see also Pennsylvania v. Wheeling and Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852) ("*Wheeling Bridge I*"), the

Plaut Court noted that a separation of powers contention had been rejected to the extent that challenged legislation had "altered the prospective effect of injunctions," 514 U.S. at 232. In *Wheeling Bridge I*, the Supreme Court had ruled that a bridge across the Ohio River was so low as to obstruct navigation, in violation of then-existing federal law, and the Court entered an injunction ordering the bridge elevated or abated. *See Wheeling Bridge I*, 54 U.S. at 521, 626. Thereafter, Congress enacted a statute declaring the bridge a lawful structure, designating it a post-road for carriage of the mails, and authorizing the bridge's owner to maintain the bridge at its then-present height. Subsequently, after the bridge had been destroyed by a storm, Pennsylvania sought to enjoin reconstruction of the bridge at the same height, arguing that the statute legalizing the bridge was unconstitutional because it "ha[d] the effect and operation to annul the judgment of the court already entered, or the rights determined thereby." *Wheeling Bridge II*, 59 U.S. at 431.

The *Wheeling Bridge II* Court noted that had its prior judgment been a judgment for money damages, Pennsylvania's contention would have had merit (and indeed did have merit insofar as the prior judgment had awarded costs), for the judgment would have been final within the meaning of the separation of powers principle and could not have been altered by an Act of Congress. *See id.* ("if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress."). However, to the extent that *Wheeling Bridge I* granted forward-looking injunctive relief, the *Wheeling Bridge II* Court ruled that the judgment was "executory" rather than final, and thus its enforcement could be prevented by Congress:

> [T]hat part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced.

Wheeling Bridge II, 59 U.S. at 431-32.

The *Plaut* Court observed that cases such as *Wheeling Bridge II* "distinguish themselves" from *Plaut*, 514 U.S. at 232, which involved only requests for monetary relief. The *Plaut* Court stated that nothing in its holding called into question the principle established in *Wheeling Bridge II*, that legislation does not violate the separation of powers by "alter[ing] the prospective effect of injunctions." *Plaut*, 514 U.S. at 232. We understand the parameters drawn by *Plaut* and *Wheeling Bridge II* to be as follows: Under the separation of powers, Congress lacks the authority to alter a finally rendered judgment ordering the payment of money. On the other hand, to the extent that a court's final judgment consists of an injunction, Congress may require alteration or termination of its future effect if the law on which the injunction was predicated has been changed. Those conditions are satisfied here. By statute Congress has altered the courts' remedial powers so that, in this class of cases, injunctions may not be issued if they are not constitutionally mandated. Congress may accordingly require the termination of the executory portions of injunctions that exceed the courts' present remedial powers.

The proposition that a court has the authority to alter the prospective effect of an injunction in light of changes in the law or the circumstances is, of course, well established. *See, e.g., System Federation*, 364 U.S. at 646-47; *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932) ("*Swift*"); *Chrysler Corp. v. United States*, 316 U.S. 556, 562 (1942); *Wheeling Bridge II*, 59 U.S. at 431-32. "The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *System Federation*, 364 U.S. at 647. Further, that authority extends to injunctions entered on consent of the parties. "[T]he power of a court of equity to modify an injunction in adaptation to changed conditions," even though the injunction "was entered by consent," is "inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *Swift*, 286 U.S. at 114. *See also Agostini v. Felton*, 117 S. Ct. 1997, 2006 (1997) ("A court errs when it refuses to modify an injunction or consent decree in light of [statutory or decisional law] changes."); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992) (consent decree may be reopened "to the extent that equity requires"); *System Federation*, 364 U.S. at 651; *Western Union Telegraph Co. v. International Brotherhood of Electrical Workers*, 133 F.2d 955, 957 (7th Cir. 1943) ("though a decree may be final as it relates to an appeal . . . , yet, where the proceedings are of a continuing nature, it is not final, . . . and the injunction will be vacated . . . where the law has been changed").

In *System Federation*, for example, a consent decree enjoined a railroad and several unions from discriminating against the railroad's nonunion employees because of their nonunion status. At the time the decree was entered, a federal statute made such discrimination unlawful. Six years later, however, Congress amended the statute to allow collective bargaining agreements permitting an employer to require union membership as a condition of employment, and the unions asked the district court to modify the decree to make it clear that the injunction against such conditions was thenceforth to "have no prospective application." *System Federation*, 364 U.S. at 645 (internal quotation marks omitted). The district court "acknowledged its authority to modify the consent decree but declined to do so, primarily out of regard for the fact that the unions . . . had consented . . . [to] an undertaking which the District Court considered was not unlawful either before or after the . . . amendments." *Id.* The court of appeals affirmed, but the Supreme Court reversed. Refusing "to recede from" the "principles of the *Wheeling Bridge* case," 364 U.S. at 650, the *System Federation* Court noted that when the underlying law governing the conduct of the parties has been altered, the court has the power to dissolve the injunction, even "though it was entered by consent,' " *id.* at 647 (quoting *Swift*, 286 U.S. at 114), in order to avoid "render[ing] protection in no way authorized by the needs of safeguarding statutory rights," *System Federation*, 364 U.S. at 648.

Given the inherent power of the courts to modify or terminate forward-looking injunctive provisions in light of changes in law or circumstances, and given the distinction drawn by the *Plaut* Court between monetary judgments and judgments granting prospective injunc-

tive relief, we conclude that plaintiffs' separation of powers challenge to the PLRA's termination provision must be rejected. Section 3626(b)(2) does not require the termination of any relief other than prospective relief, and the definition of prospective relief expressly excludes compensatory monetary damages. Thus, the PLRA does not seek retroactively to revise past adjudications by the Judicial Branch that had become "final" within the meaning of *Plaut*.

Most of our sister Circuits that have considered this question have also reached the conclusion we reach here today. *See, e.g.*, *Hadix v. Johnson*, 133 F.3d 940, 942-43 (6th Cir.) (per curiam), *cert. denied*, 118 S. Ct. 2368 (1998); *Dougan v. Singletary*, 129 F.3d 1424, 1426 (11th Cir. 1997) (per curiam), *cert. denied*, 118 S. Ct. 2375 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d at 656-57; *Gavin v. Branstad*, 122 F.3d 1081, 1089 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 2374 (1998); *Plyler v. Moore*, 100 F.3d 365, 371-72 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2460 (1997). The only contrary court of appeals opinion of which we are aware, issued by a panel of the Ninth Circuit, was withdrawn by that court in connection with its granting of rehearing *en banc*. *See Taylor v. United States*, 143 F.3d 1178 (9th Cir.), *petition for rehearing granted, and panel opinion withdrawn*, 158 F.3d 1059 (9th Cir. 1998) (en banc).

For the reasons discussed above, we share the majority view that the Act's requirement for the termination of prospective relief, where that relief is not and cannot be supported by need-narrowness-intrusiveness findings, does not violate the finality** principle of separation of powers.

** As indicated earlier, we do not address the limitation on Congressional power to prescribe a rule of decision, enunciated in *United States v. Klein*, since plaintiffs have not argued that issue to the en banc court.

B. *Interference With Article III Power*

Nor is there merit in plaintiffs' contention that the PLRA's provision for termination of consent decrees strips the courts of their Article III power and duty to remedy constitutional wrongs, for the Act neither alters the scope of substantive rights nor limits the type of relief that may be ordered if that relief is necessary to redress violations of those rights. Rather, the Act forbids forward-looking relief in excess of what the court finds is necessary. Congress's power to limit the remedial authority of the federal courts, which is grounded in its power to "ordain and establish" inferior federal courts, U.S. Const. Art. III, § 1, is well established. *See, e.g., Hanna v. Plumer*, 380 U.S. 460, 472-73 (1965); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941). Congress may, for example, establish substantive and procedural prerequisites to the granting of specific types of relief, *see, e.g., Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329-30 (1938) (certain statutorily-specified findings required before court may issue injunction in labor dispute); or give one court exclusive jurisdiction to enjoin the operation of a particular statutory scheme, *see Lockerty v. Phillips*, 319 U.S. 182, 187-88 (1943); or bar all federal courts from enjoining the collection of state taxes so long as adequate remedies are available in state court, *see California v. Grace Brethren Church*, 457 U.S. 393, 407-08, 411 (1982). *See also Yakus v. United States*, 321 U.S. 414, 442 n.8 (1944) (listing "other instances in which Congress has regulated and restricted the power of the federal courts to grant injunctions").

In the PLRA, Congress has neither defined nor altered the federal rights that may be vindicated in prisoner litigation. Nor has it forbidden the court, if it finds a violation of federal right, to order or enforce such relief as

the court finds is needed to remedy the violation of that right. The Act's termination provision simply forbids the continuation of prospective relief that exceeds what is needed to remedy a continuing violation of the federal right. Existing consent decrees may have ordered, without adjudication of the merits of the plaintiffs' claims or without adjudication of the appropriate scope of the remedy for a proven federal violation, more relief than was needed to remedy the violations. The Act's elimination of the parties' ability to obtain judicial enforcement of the forward-looking provisions of a judgment obtained without such adjudications neither affects the court's power " 'to say what the law is' in particular cases and controversies," *Plaut*, 514 U.S. at 218 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177), nor infringes "litigants' right to have claims decided before judges who are free from potential domination by other branches of government," *Commodity Futures Trading Commission v. Schor*, 478 U.S. at 848 (internal quotation marks omitted). The court remains authorized to adjudicate the controversies before it and to order such relief as is necessary to remedy the federal violations it finds established. We conclude that the Act does not represent an abrogation of Article III power.

C. *Due Process and Equal Protection*

Plaintiffs' remaining constitutional contentions do not require extended discussion. Their principal due process contention is that the termination provision deprives them of vested contractual rights. As discussed in Part III.A. above, however, the provisions of a consent decree that order prospective relief remain subject to modification or alteration for changes in law or circumstances. Such right as a litigant may have to prospective relief is thus neither final nor "vested" in the constitutional sense.

Further, as the *System Federation* Court noted, a court considering whether modification of a consent decree is warranted is not bound by principles of contract:

> "We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act . . . . [I]n truth what was then adjudged was not a contract as to any one. The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be."

364 U.S. at 651 (quoting *Swift*, 286 U.S. at 114-15). The *System Federation* Court stated that "[t]he parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction." 364 U.S. at 651.

We conclude that plaintiffs' due process contentions were properly rejected. *Accord Dougan v. Singletary*, 129 F.3d at 1426-27 ("a decree, unlike a money judgment, is subject to later adaptation to changing conditions. Legislative modification of the law governing the decree thus does not impermissibly divest the inmates of any vested rights"); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d at 658 ("modifiable decrees cannot create vested rights"); *Gavin v. Branstad*, 122 F.3d at 1091 ("a judgment that is not final for purposes of the separation of powers is also not final for purposes of due process").

Plaintiffs' equal protection argument is principally that the PLRA burdens the right of access to courts and thus warrants "strict scrutiny." The right of access to courts is indeed fundamental, *see, e.g., Lewis v. Casey*, 518 U.S. 323, 350-51 (1996); *Bounds v. Smith*, 430 U.S.

817, 821-23 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 578-80 (1974), but the termination provision does not impair that right. As discussed in Part III.B. above, nothing in the Act alters plaintiffs' federal rights or prevents the court from granting such relief as is necessary to remedy violations of those rights. Plaintiffs remain free to seek an adjudication that their federal rights are being violated and to secure the relief necessary to remedy such federal violations as they establish. Further, under the Act, existing provisions for prospective relief designed to remedy violations of those rights are not to be terminated where the need-narrowness-intrusiveness findings can be made with respect to the continuation of such relief. *See* 18 U.S.C.A. § 3626(b)(3) (West Supp. 1998). Thus, plaintiffs' fundamental right of access to the courts is not burdened. *Accord Inmates of Suffolk County Jail v. Rouse*, 129 F.3d at 660 ("[u]nder the PLRA, the courthouse doors remain open and the withdrawal of prospective relief—above and beyond what is necessary to correct the violation of federally protected rights—does not diminish the right of access"); *Gavin v. Branstad*, 122 F.3d at 1090 ("[t]he right to enforce a consent decree that goes beyond the bounds of constitutional necessity is not equivalent to the right to bring constitutional grievances to the attention of the courts"); *Plyler v. Moore*, 100 F.3d at 373 ("[s]imply put, the Inmates have confused the right of access to the courts with the scope of the available substantive relief").

Since no fundamental right is burdened, and prisoners are not a suspect class, strict scrutiny of the Act is not warranted. Plaintiffs' equal protection claim must thus be rejected "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993)

(internal quotation marks omitted). Under this standard, the burden is on the person challenging the legislation "to negative every conceivable basis which might support it, . . . whether or not the basis has a foundation in the record." *Id.* at 320-21 (internal quotation marks omitted). Plaintiffs fall far short of meeting their burden. The terms and legislative history of the Act make it clear that, in the unique context of litigation challenging prison conditions, *see generally Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989); *Turner v. Safley*, 482 U.S. 78, 89 (1987), Congress adopted the remedial and termination provisions in order to promote, *inter alia*, principles of federalism and judicial restraint. The objective of limiting the grant or continuation of prospective relief in this context to no more than what is found necessary to remedy the violation of a federal right is unquestionably a legitimate one. *Accord Inmates of Suffolk County Jail v. Rouse*, 129 F.3d at 660; *Dougan v. Singletary*, 129 F.3d at 1427; *Gavin v. Branstad*, 122 F.3d at 1090; *Plyler v. Moore*, 100 F.3d at 374.

IV. PROCEEDINGS ON REMAND

As indicated in Part II above, we have concluded that the Act requires the termination of consent decrees providing for prospective relief entered without the requisite need-narrowness-intrusiveness findings, but that it does not require the annulment or vacatur of those decrees. Accordingly, we reverse so much of the order of the district court as vacated the Decrees at issue here.

Further, as noted in Part I.A. above, the Act contains a "LIMITATION" on the immediate termination requirement, which provides that

> *[p]rospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right*, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

18 U.S.C.A. § 3626(b)(3) (West Supp. 1998) (emphasis added). Although § 3626(b)(2) uses the phrase "*immediate* termination" of prospective relief where there have been no need-narrowness-intrusiveness findings (emphasis added), at least two aspects of that subsection, read in conjunction with the "LIMITATION" subsection that follows it, persuade us that the word "immediate" was not intended to mean without any time intervening between motion and termination.

First, although the termination provision presupposes the absence of need-narrowness-intrusiveness findings, the "LIMITATION" subsection provides that prospective relief "shall not terminate" if the court makes the requisite written need-narrowness-intrusiveness findings; presumably such written findings cannot be made instantaneously upon the motion by a defendant for termination of a decree. Hence, Congress must have intended that there be some interval during which the requisite findings could be made. Second, the findings envisioned by the "LIMITATION" subsection must be "based on the record" and must state that prospective relief is "necessary to correct a current and ongoing violation of the Federal right." Evidence presented at a prior time, however, could not show a violation that is "current and ongoing." Hence, the "record" referred to cannot mean the prior record but must mean a record reflecting con-

ditions as of the time termination is sought. In sum, we interpret §§ 3626(b)(2) and (3), read together, to mean that, when the plaintiffs so request in response to a defendant's motion for termination, the district court must allow the plaintiffs an opportunity to show current and ongoing violations of their federal rights.

In the present case, plaintiffs asked the district court to allow them an opportunity to present evidence of such current and ongoing violations and of the need for continuation of the prospective relief provided in the Decrees. We conclude that plaintiffs should have been given that opportunity. Accordingly, we remand for further proceedings.

The Act provides that a motion for immediate termination of prospective relief pursuant to § 3626(b)(2) operates to stay such relief beginning on the 30th day after such a motion, *see* 18 U.S.C.A. § 3626(e)(2) (West Supp. 1998). The Act also allows the district court to postpone the automatic stay for 60 additional days for good cause other than general calendar congestion. *Id.* § 3626(e)(3). Since the district court here did not allow plaintiffs to make a record with respect to the need for a continuation of prospective relief, we instruct that the 30-day period prior to the commencement of the automatic stay is to be deemed to begin on the day following the issuance of our mandate herein.

Plaintiffs have also argued that the above 30- and 60-day periods are insufficient to give them a meaningful opportunity to make a record as to the need for continuation of prospective relief and hence constitute a denial of due process. We regard any challenge at this time to the constitutionality of the automatic stay provision as premature, and we decline to address it on this appeal.

Plaintiffs have also requested that this Court extend the stays we have previously entered during the pendency of this appeal, in order to keep the Consent Decrees in place until the proceedings on remand have been completed. In light of our reversal of the district court's order vacating the Decrees, we regard our prior stays as moot, and we decline to extend them further. Our current stay will be vacated upon the issuance of the mandate.

CONCLUSION

We have considered all of plaintiffs' arguments that are properly before us on this *en banc* rehearing and, except as indicated above, have found them to be without merit. We conclude (a) that the PLRA permissibly provides for the termination of forward-looking provisions of consent decrees in the absence of the need-narrowness-intrusiveness findings required by the Act, but does not provide for vacatur of those decrees; and (b) that plaintiffs should have been given an opportunity to present evidence showing the need for continuation of prospective relief.

The opinion of the panel is vacated. The current stay granted by this Court is terminated. The order of the district court is affirmed insofar as it upheld the constitutionality of § 3626(b)(2), and is reversed insofar is it vacated the Consent Decrees, and the matter is remanded for further proceedings not inconsistent with this opinion.

JACOBS, *Circuit Judge* (with whom WINTER, *Chief Judge*, and KEARSE, WALKER, MCLAUGHLIN, CABRANES, and PARKER, *Circuit Judges*, join), concurring:

I write separately to respond to Judge Leval's concurring opinion, which (i) addresses the passage in the Court's in banc opinion that explains why consent decrees are not contracts subject to state-court enforcement (Majority Opinion at 8493-8495), and (ii) characterizes that passage as unjustified dictum. For the following reason, I think that the passage is needed and useful.

In testing the constitutionality of the PLRA's "termination of prospective relief" provision (18 U.S.C. § 3626(b)), the Panel opinion intimated that the provision might fail if it were read to require the termination of the consent decrees. *See Benjamin II*, 124 F.3d 162, 176-77 (2d Cir. 1997). The Panel opinion avoided that risk by reading the provision solely as a limit on the power of federal courts to enforce the consent decrees, and by holding therefore that the consent decrees are not terminated (or vacated) and may be enforceable as contracts in the state courts. *Id.* The Panel opinion justified its course on the perfectly sound principle that courts should avoid making unnecessary constitutional pronouncements if a reasonable interpretation of the statute would obviate the constitutional difficulties. *See Lo Duca v. United States*, 93 F.3d 1100, 1110 (2d Cir. 1996) ("[W]e are instructed to construe federal statutes to avoid constitutional infirmity . . . ."). Only by invoking this doctrine did the Panel opinion avoid reaching certain of plaintiffs' separation of powers, due process, and equal protection arguments. *Benjamin II*, 124 F.3d at 176-77, 177 n.18.

The Court's in banc opinion reaches and decides the questions that the Panel avoided. *See* Majority Opinion at 8494 ("We do not see any basis for inferring that Congress meant federal consent decrees that are not based on need-narrowness-intrusiveness findings to remain in effect and amenable to enforcement in state courts."). Therefore, it becomes a natural and integral part of the in banc Court's analysis to say why we are reaching tough constitutional issues that we should avoid if we can, that is, why the detour taken by the Panel opinion is foreclosed. To do that, the Court's in banc opinion demonstrates that the consent decrees are not in the nature of contracts that remain subject to enforcement and administration in the state courts.

Judge Leval's concurring opinion argues that because the Court's in banc opinion vacates the Panel opinion, there is no need to address the reason given by the Panel for avoiding the tough constitutional question. I disagree. The Panel opinion is vacated, not annihilated. Because we vacate it, we should say why, and explain our course, including why we reach questions that might be avoided if the consent decrees were contractual in character. The resulting passage in the Court's in banc opinion is not a core holding, but neither is it dictum, let alone dictum that is "advisory" and "gratuitous." *See* Leval Concurring Opinion at 8517, 8521.

LEVAL, *Circuit Judge* (with whom Judge Oakes concurs, and Judge Calabresi concurs as to Part II) concurring in part:

With one reservation outlined below, I join in the majority's opinion.

I. In civil actions relating to prison conditions ("prison litigation"), the Prison Litigation Reform Act ("PLRA") grants the defendant the right to immediate termination of the prospective effect of injunctions to the extent their mandates do not meet the statute's need-narrowness-intrusiveness test. *See* 18 U.S.C. § 3626(b)(2). The plaintiffs contend that a congressional enactment requiring such termination undoes the judgment of a federal court and thereby violates the Constitution's separation of powers.

Although Congress has indeed required the alteration of a federal court's judgment, it has done so in a permissible manner. In § 3626(a), Congress limits the power of the courts to grant prospective relief in prison litigation to circumstances that satisfy the need-narrowness-intrusiveness test. Subsection (c)(1) further provides that a "court shall not enter or approve a consent decree" unless the decree satisfies the same test. Under subsection (b)(2), previously-entered consent decrees are terminable if they do not meet the need-narrowness-intrusiveness test. Because subsection (c)(1)'s limitation on the courts' remedial powers and subsection (b)(2)'s provision for termination turn on the identical test, courts today would lack the power to enter the consent decrees that are terminable. All Congress has done in § 3626(b)(2), then, is to bar the courts from continuing to enforce previously entered injunctions of the kind they now lack the power to command.

As I understand it, the Supreme Court's opinion in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855) ("*Wheeling Bridge II*"), holds that a congressional interference with a federal court's judgment in such circumstances does not infringe the separation of powers. In an earlier case, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 578 (1855) ("*Wheeling Bridge I*"), the Supreme Court had ordered a bridge raised or removed because it was a public nuisance that impeded navigation. Congress, however, then passed legislation designating the bridge a post-road. *See Wheeling Bridge II*, 59 U.S. at 429. Because, as a matter of law, a congressionally-designated post-road could not be adjudged a public nuisance, the Court was no longer empowered to order the abatement it had mandated in *Wheeling Bridge I*. The Supreme Court thus ruled in *Wheeling Bridge II* that Congress could lawfully require termination of the prospective effect of the earlier injunction. *See Wheeling Bridge II*, 59 U.S. at 431-32, 436.

I understand *Wheeling Bridge II* to support the proposition that, where a federal court's injunction has ongoing, prospective effect, and Congress modifies the law upon which it was predicated so that the court is no longer empowered to issue such an order, Congress may give the defendant the right to the termination of the injunction. In this case, Congress has done just that.

I join in the portion of the majority opinion that so rules, as well as in its rejection of the plaintiffs' contentions that § 3626(b)(2) violates constitutional principles of equal protection and due process.

II. I do not join in Part IIA of the majority's opinion. The panel opinion had expressed views that, once the consent decrees were terminated, the plaintiffs would

continue to have contract rights arising from the settlement agreements that underlay the consent decrees, and that the plaintiffs might enforce those contract rights in state courts. The *in banc* majority opinion disagrees. It asserts first that the settlement agreements underlying the consent decrees cannot stand as enforceable contracts once the consent decrees are vacated; it then adds that, in any event, the PLRA does not tolerate the survival of such contract rights.

I express neither agreement nor disagreement with these views. In my view, those issues are simply not before us. The issues on which the parties have sought our ruling are whether § 3626(b)(2) requires termination of consent decrees that do not comply with the need-narrowness-intrusiveness test, and whether such termination comports with the Constitution. We answer each of those questions in the affirmative.

But neither we nor the district court have been asked to adjudicate whether, after the termination of the consent decrees, prisoners may bring contract actions in state courts predicated on the settlement agreements that underlie the consent decrees. The majority's views on that question play no role whatsoever in supporting the conclusions it reaches on the issues that are before us. The proposition that plaintiffs would be barred, after the termination of the consent decrees, from enforcing contract rights is not part of the reasoning that leads us to conclude the decrees must be terminated. The entire discussion is dictum. These are advisory views that have no legal force.

I assume the majority has included the discussion because of its strong disagreement with the contrary views stated in the panel's opinion. But we have vacated the panel's opinion and have substituted the opinion of

the *in banc* court. The panel opinion no longer stands as an opinion of the Second Circuit. If a majority of the court feels a need to make clear that it does not endorse the views expressed in the panel opinion, it could simply say so. I do not understand why disagreement with a vacated panel opinion justifies our undertaking to adjudicate an issue not presented in this litigation.

I do not mean to imply that the discussion should necessarily be omitted because it is advisory. I recognize that in well-chosen instances, advisory discussion in a court opinion can serve a useful purpose. My greater concern is that the majority seems to present the discussion as a holding. A reader of the majority opinion, who did not take care to compare this discussion with the relief granted, might easily conclude that the Second Circuit has adjudicated this question. We have done no such thing, and in fact have no power to do so in a case that does not put that question before us.

To avoid confusion as to the state of the law, courts have an obligation when they indulge in advisory discussion to identify it as such. A court's holding, including the reasoning underlying it, has the force of law. Within the sphere of that court's authority, the public and subservient courts are legally bound to follow its ruling. On the other hand, dictum—even when uttered by the highest court in the land—has no legal force. A court's power to make law derives solely from its obligation to decide cases, and extends no further than the reasoning that underlies the judgment. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.) ("It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be

respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").[1] Thus, while dictum may help observers to predict how the law may develop if and when the court eventually rules on a question, it does not have the force of law. No one is legally obligated to follow it.

If litigants or courts come to consider in the future whether state law contract rights survive the termination of the consent decrees under the PLRA's § 3636(b)(2), they should recognize that the Second Circuit has not adjudicated that question. It has merely expressed advisory views that may or may not be found persuasive.[2]

* * *

[1] The Supreme Court recognized that its power to "say what the law is" extends solely to properly presented cases and controversies as early as 1793. Responding to a written request from Secretary of State Thomas Jefferson on behalf of President Washington seeking advice on legal questions arising from treaties between the United States and France, the Justices wrote President Washington a letter stating in part that "[t]he lines of separation drawn by the Constitution between the three departments of the government—their being in certain respects checks upon each other—and our being judges of a court in the last resort—are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to." Letter from the Justices to George Washington (Aug. 8, 1793), *reprinted in Hart & Wechsler's The Federal Courts and the Federal System* 93 (Richard H. Fallon et al. eds., 4th ed. 1996).

[2] *See Imprisoned Citizens Union v. Prasse*, 1999 U.S. App. Lexis 2944, at *31-32 (3d Cir. February 25, 1999) ("If the Inmates have valid contractual claims that survive termination [of consent decrees under the PLRA], such claims are based solely upon . . . Pennsylvania law, and are not affected by the PLRA. 18 U.S.C. § 3626(d) ("The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law."). The Inmates are therefore free to pursue relief in the Pennsylvania courts. It is not our province to speak to the validity of any claims arising under Pennsylvania law, or to award relief therefor.") (internal quotation marks, citations, and brackets omitted).

In response to this opinion, Judge Jacobs, joined by a majority of the court, asserts that the majority's rejection of the survival of contract rights "is not a core holding, but neither is it dictum, let alone dictum that is 'advisory' and 'gratuitous.' " He asserts that the passage is "needed and useful." (Judge Jacobs stops short of ever directly asserting that the discussion is a "holding." Perhaps that omission is intentional.)

I think it reasonable for Judge Jacobs to insist that the discussion is "useful." The discussion expresses my colleagues' disagreement with the panel on an issue that is likely to arise. The publication of such a debate may well be useful. When the question arises in litigation, the judges charged with deciding whether the PLRA tolerates or forbids the survival of contract rights may well benefit from the airing of the views of the Second Circuit's judges. My main concern, as stated above, is not with my colleagues' expression of their views, but with presentation in a manner that makes it appear to be a holding, having the force of law.

Judge Jacobs seems to argue that the majority's interpretation of the PLRA as forbidding, rather than tolerating, the survival of contract rights is not merely advisory. His argument is ingenious and requires careful attention.

He tacitly concedes that the court is not granting relief that depends on a finding that the PLRA forbids the survival of contract rights. Nonetheless, he argues as follows:

1. We consider and uphold the constitutionality of the statute on the assumption that it forbids the survival of contract rights.

2. We do this in the face of a prudential principle that counsels against adjudicating constitutional problems if they can be reasonably avoided.

3. Under this principle we cannot justify resolving the constitutional question in step 1 if the PLRA can plausibly be interpreted to allow for the survival of contract rights (as that interpretation would obviate the constitutional inquiry).

4. We therefore consider whether the PLRA may reasonably be construed to tolerate the survival of contract rights and conclude that it may not.

5. Ergo, Judge Jacobs concludes, our decision that contract rights do not survive the termination of the consent decrees is not merely advisory, albeit not a "core holding."

Judge Jacobs's explanation flows elegantly from step 1 to step 5. The principal problem is that step 1 is gratuitous.[3] We have no occasion to consider the question whether the PLRA passes constitutional muster if construed to extinguish contract rights. No one has asked us to rule on whether contract rights survive the termination of the decrees. And our decision requiring the termination of the decrees, the issue we are required to adjudicate, would be the same regardless whether the PLRA tolerates or forbids the survival of contract rights following the termination.

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[3] In addition, the principle on which Judge Jacobs relies in step 2 counsels avoidance of constitutional issues only when they present serious problems. *See Almendarez-Torres v. United States*, ___ U.S. ___, 118 S. Ct. 1219, 1228 (1998). The majority opinion finds no serious consitutional problem in upholding the statute on the assumption that it bars survival of contract rights.

Judge Jacobs offers a second reason why the discussion is not advisory, which is that "[t]he Panel opinion is vacated, not annihilated." In other words, people can still read it, and be influenced by its ideas. If we disagree with it we should say so and explain why we have vacated it.

Once again, the majority's desire to disavow the views asserted in the panel's opinion may well justify the discussion, but that does not make it a holding. Whether a discussion is holding or dictum depends on its relationship to the relief the court renders, not on its relationship to the pronouncements of other judges in the prior history of the case. Until we are asked to rule on the survival of contract rights, our views of those competing interpretations of the PLRA are advisory.

Even if the majority were to insist explicitly that the passage is not a dictum, but a holding, that would not make it so. That is because a court's power to make law derives solely from its obligation to decide the disputes before it. As Judge Friendly explained in *United States v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J. concurring), "A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.' "

I join in the adjudicatory portion of the majority's opinion, but not in Part IIA.

CALABRESI, *Circuit Judge*, concurring in the result:

The court today does violence to two fundamental—and conservative—principles of our Constitution: Separation of Powers and Federalism. It does the first to no purpose whatsoever; it does the second needlessly, by reaching out to express views on an issue that is not yet before us. It is led to these results by an understandable desire to follow what it believes to be the will of Congress. But in so doing, the court attributes to the legislature views that Congress is most unlikely to have even considered, let alone held.[1]

This case raises principally two questions. The first is whether Congress, by the language it used in the PLRA, sought directly to terminate preexisting court-ordered consent decrees,[2] or whether, instead, Congress used its paramount powers merely to alter the underlying law and left it up to the courts to exercise their traditional role of applying those changes. This question may seem formalistic, since the courts, responding to the congressional action, would in the case before us be inexorably led either to terminate the decrees or to bar future relief

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[1] Concededly, all the other courts of appeals that have confronted the legislation before us today have reached similar—or, in the case of a panel of the Ninth Circuit, which held the statute unconstitutional, equally unfortunate— results. *See, e.g., Imprisoned Citizens Union v. Ridge*, ___ F.3d ___, 1999 WL 93802, at *4-*8 (3d Cir. Feb. 25, 1999); *Taylor v. United States*, 143 F.3d 1178 (9th Cir. 1998), *petition for rehearing granted, and panel opinion withdrawn*, 158 F.3d 1059 (9th Cir. 1998) (en banc); *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998), *cert. denied*, ___ U.S. ___, 118 S. Ct. 2368 (1998); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997) (per curiam), *cert. denied*, ___ U.S. ___, 118 S. Ct. 2375 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 2366 (1998); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 2374 (1998); *Plyler v. Moore*, 100 F.3d 365, 372 (4th Cir. 1996). On this point, see *A Cautionary Note*, *infra* Part III.

[2] Except in certain limited circumstances. *See ante* at 36-38.

under them, thereby reaching precisely the same result whichever reading is given to the congressional language. In fact, however, it entails issues of the most fundamental sort concerning the Separation of Powers.

The second question asks to what extent Congress intended by the PLRA to limit the ability of prisoners to enter into contracts, enforceable in state courts, by which the prisoners obtain benefits in exchange for the waiver of possible federal claims. The answer to this latter question is entirely independent of the answer given to the first question. For, regardless of whether the PLRA directly terminated (or indeed vacated) federal court judgments or merely led courts not to give these consent decrees future effect, it would still remain uncertain whether the PLRA permitted state courts to find in existence and to enforce, under state contract law, agreements arrived at by the parties contemporaneously with the federal court consent decrees. I respectfully believe that the court today answers both of these questions incorrectly. Because the answers to these questions do not affect the outcome in the case before us, and because, as to some of the subsidiary issues in the case, I agree with the majority's reasoning as well as its conclusion, I concur in the court's result,[3] while strenuously, though respectfully, dissenting from most of its reasoning.

I. DOES THE PLRA DIRECTLY TERMINATE THE CONSENT DECREES?

A. The Language of the PLRA and Legislative Intent

The relevant provision of the PLRA, 18 U.S.C. § 3626(b)(2), reads:

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[3] *See infra* note 21.

> Immediate Termination of Prospective Relief.—In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C.A. § 3626(b)(2) (West Supp. 1998).

On its face, this language does not terminate the consent decrees or any other court judgments. It does no more than prohibit *prospective relief* under the prior judgments. And, as both the panel opinion and the *in banc* majority concluded, such termination of prospective relief in federal courts is clearly constitutional. The *in banc* majority also holds that this language bars *state* courts from granting prospective relief under the consent decrees and that it does so constitutionally.

On this latter point, the panel had held the opposite. Despite some legislative history to the contrary, the panel concluded that the PLRA terminated federal court jurisdiction but left state courts free to enforce the decrees.[4] The question is a close one, and I am not fully convinced by the majority, but it is sufficiently in doubt that I am not inclined to dissent on the issue. Moreover, I agree completely that, if the PLRA limits state as well as federal courts from granting prospective relief under the decrees, it does so constitutionally.

Were this all there was to this section of the PLRA, the *in banc* court and I would not diverge on the first of the two issues before us. Our disagreement stems from

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[4] *See Benjamin v. Jacobson*, 124 F.3d 162, 168, 174 (2d Cir. 1997).

the way in which the majority of the court interprets the definitional section that applies to this part of the PLRA. That section reads as follows:

> (1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;
>
> . . . .
>
> (5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;
>
> (6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;
>
> (7) the term "prospective relief" means all relief other than compensatory monetary damages;
>
> . . . .
>
> (9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

18 U.S.C. § 3626(g).

The majority takes this definitional section to mean that the federal court judgments—the consent decrees themselves—are part of the relief that the PLRA directly terminates. It concedes that such a reading, albeit literal, is not natural. *See ante* at 20. And, after correctly suggesting that Congress has a right to define one thing to

mean something different from what it normally means, the court looks to the legislative history of the PLRA to conclude that Congress has, in effect, done just that. *See ante* at 26-27. In this respect, the court agrees with the First Circuit's decision in *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 2366 (1998), which, after finding the same reading of § 3626(g) to be unlikely, nevertheless, on the basis of legislative history, deemed it to be what Congress intended. *See id.* at 654.[5]

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[5] The panel opinion, in contrast, argued that reading the PLRA's definition of "prospective relief" found in § 3626(g)(7) (which the PLRA orders to be "immediate[ly] terminat[ed]") to include consent decrees "has significant linguistic problems." *Benjamin*, 124 F.3d at 167. This was because decrees or settlement agreements are not forms of relief akin to injunctions or damages. Relief, instead, is generally understood to be made available *under or pursuant to* a consent decree or settlement agreement. Thus, although one could read the PLRA's definition of "prospective relief" (which includes "all relief other than compensatory monetary damages," 18 U.S.C. § 3626(g)(7), and "means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements," *id.* § 3626(g)(9)), to encompass consent decrees, the panel instead read the termination of prospective relief ordered under § 3626(b)(2) as leaving the decrees intact, but removing federal jurisdiction to order any future relief under those decrees. *See Benjamin*, 124 F.3d at 167.

The panel did so because adopting the first reading would require viewing private settlement agreements as a type of relief. And that, the panel said, made no sense because private settlement agreements are simply not a form of relief. Therefore, the panel argued, one should "read the definitional phrase as saying 'the term "relief" means all relief in any form that may be granted or approved by the court, and includes [all relief granted pursuant to] consent decrees but does not include [relief granted pursuant to] private settlement agreements.' " *Id.* (alteration in original). I continue to believe that this reading of the provision is the correct one.

To put it another way, while Congress can, for example, direct us to treat bananas as if they were apples, when Congress, in a definitional section, seems to say that bananas *are* apples, we should ask whether that is really what Congress meant or whether, instead, it merely intended to bring about the same result (identical treatment for both types of fruit) without requiring such an abuse of words.

The problem with such a reading—apart from its admitted linguistic awkwardness—is that there is no reason to suppose that Congress intended it. The legislative history cited by the majority (and by the First Circuit) surely shows that Congress meant, and vehemently so, not to have such consent decrees enforced by federal courts except as strictly necessary to protect federal constitutional rights. *See* H.R. Conf. Rep. No. 104-378, at 166 (1995); H.R. Rep. No. 104-21, at 24-26 (1995). Less clearly, the same legislative history can be read—as the *in banc* majority does—to indicate that Congress, having barred prisoners from obtaining federal relief under the decrees, wished to prevent them from going into state court and getting the same decrees enforced there. *See, e.g.*, H.R. Rep. No. 104-21, at 25 (noting that the provision will "insure[ ] that inmates will not simply run from the federal courthouse to the state courthouse to bring the same suits and to demand the same burdensome and unnecessary relief that the federal courts have irresponsibly imposed on local judicial systems"). But there is nothing in what the majority (and the First Circuit) cites, or in what I have been able to find, that indicates that Congress meant to infringe on an existing *judgment of the courts*, rather than merely to change the underlying law, so that the courts would reach the same ultimate result by modifying the effect of their own prior rulings. In other words, there is nothing in the legislative history that in any way suggests that Congress cared a jot or tittle about whether *relief* under the decrees was to be precluded as a result of court adherence to the PLRA, or whether the prior court judgments—that is, *the decrees themselves*—were to be terminated directly by congressional fiat.[6]

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[6] And here, the fact that the *in banc* majority reads the PLRA to bar prospective relief in state as well as federal courts becomes crucial. As the panel read the PLRA, the decrees—if they survived—could be

The difference between the two, though seemingly of no interest to Congress—which wanted certain *results* and was understandably unconcerned with process—is fundamental to a sound doctrine of Separation of Powers and hence to the constitutionality of the PLRA. As the majority reads the PLRA, Congress would for the first time in our constitutional history have validly commanded the alteration or termination of a court judgment. Giving the statutory language its more natural meaning would instead read the law to do no more than what Congress (with the courts' approval) has frequently done in the past. *See, e.g.*, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1856) ("*Wheeling Bridge II*"). And this still would achieve precisely the same results in terms of the prisoners before us and of their rights under these decrees. I believe the court reaches its radical conclusion because it fails to appreciate the appropriately formalistic nature of the Separation of Powers doctrine.

B. Good Fences Make Good Neighbors[7]

The Sovereign cannot, either as a result of contracts and consent decrees into which it has entered, or as a

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enforced in state courts. Hence, under the panel's reading, the termination *vel non* of the decrees themselves directly affected results. It is for that reason that the panel said that the difference between termination of the decrees and termination of future relief under them was not simply formal. *See Benjamin*, 124 F.3d at 168. As the *in banc* court reads the PLRA, instead, future relief is barred in *any* court. That being so, the *result* is identical whether the decrees are terminated or whether courts are precluded from giving future relief under them.

[7] *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (quoting Robert Frost, *Mending Wall*, *in The New Oxford Book of American Verse* 395-96 (Richard Ellmann ed., 1976)). Of course, Justice Breyer, who wrote separately in *Plaut*, was correct to point out that the poet was making a different point. *See Plaut*, 514 U.S. at 245 (Breyer, *J.*, concurring in the judgment) (quoting Frost in turn: "Before I built a wall I'd

result of court judgments, be precluded from governing in the public interest to the full extent of its powers. Thus, a contract by which the government agrees not to go to war for a certain number of years in exchange for an agreement by a manufacturer to produce pruning hooks instead of spears cannot keep the Sovereign from initiating hostilities, and neither can a consent decree between the manufacturer and the Sovereign (entered into, let us say, in settlement of an antitrust action in the spear industry). Similarly, a consent decree (or a contract, for that matter) by which a state agrees to furnish cigarettes to prisoners if they are willing to drop an action against the state cannot keep the government (either state or national) from passing laws prohibiting the distribution of cigarettes. The fact that in all such cases no court would thereafter be able to enforce the preexisting contract or the prior court judgment (embodied in a consent decree) is of no significance and does not, under the Separation of Powers doctrine, limit the capacity of the state validly to enact such laws.[8]

In the same way, the existence of court judgments that have some future consequences—orders that damages be paid, or that a nuisance or a continuing trespass be enjoined, for example—in no way precludes the Sovereign from altering laws governing legal tender or

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ask to know/What I was walling in or walling out."). But regardless of whether Justice Breyer is correct as a literary critic, Justice Scalia's point is well-taken—the Framers had a keen appreciation of the importance of drawing sharp distinctions (building high walls, as it were) between the domains of the respective branches of our federal government.

[8] *See* Guido Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 Yale L.J. 1191, 1202-03 (1962) (collecting cases, and noting that, even when a government is a party to a contract and alters that contract to its financial benefit, the government is not barred from doing so, as long as it demonstrates that the change was also passed in part for the general welfare).

nuisance or trespass so [illegible] the courts will be led to ignore or to alter their earlier rulings and thereby, in effect, to nullify their prior judgments. This is so with respect to judgments that have predominantly present effects. Thus, a court would necessarily and properly amend a decree ordering that damages be paid in gold so as not to violate a subsequent statute prohibiting the private transfer of gold. This is also so, and more likely to happen, when a judgment (like a consent decree or an injunction) has important future effects.

The difference between the two situations is simply that, in the latter case, the probability that the legislature will intervene—and render the prior judgment, contract, or consent decree effectively unenforceable by the courts—is much greater than in the former. In both cases, however, the point is the same. The Sovereign being Sovereign cannot be kept from passing laws, and thereby furthering its view of the public interest, merely because a contract, consent decree, or judgment of any sort exists and would be negatively affected or rendered unenforceable as a result of such legislation. The legislature, in all such cases, acts on its side of the constitutional fence. And its good neighbor—the judiciary—responds accordingly on its own terrain.

That is the meaning of *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), in which the Supreme Court required the " 'court of equity to modify an injunction in adaptation to changed conditions.' " *Id.* at 647 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932)). In *System Federation*, the existing consent decree forbade party railroads and unions from discriminating against nonunion laborers. *See id.* at 644. A subsequent congressional amendment to the Railway Labor Act permitted, in certain circumstances, contracts

requiring union labor. *See id.* As a result, the Supreme Court found that the district court had abused its discretion when it refused to modify the consent decree. *See id.* at 650-53; *see also Swift & Co.*, 286 U.S. at 114 ("A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.").

It is also the meaning of *Wheeling Bridge II*. In *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852) ("*Wheeling Bridge I*"), the Court had found that a bridge over the Ohio River was a public nuisance because its height obstructed the free navigation of the river and thus contravened regulations of Congress issued pursuant to the Commerce Power. *See id.* at 626. A subsequent enactment by Congress had declared the bridge to be a post-road—and therefore not subject to nuisance law—and found that, at its proposed height, the bridge did not interfere with any public rights of free navigation. *See Wheeling Bridge II*, 59 U.S. (18 How.) at 426. Accordingly, in *Wheeling Bridge II* (which came back to the Court when the prior victors sought a contempt order against the bridge company), the Court recognized the change in the underlying law (and "rights") and therefore determined that the injunctive decree could no longer be enforced by the courts. *See id.* at 431-32.[9]

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[9] Subsequent Supreme Court cases have repeatedly interpreted *Wheeling Bridge II* as being premised on this rule. *See, e.g.*, *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 70 (1913) (citing *Wheeling Bridge II* for the proposition that "[i]t is for Congress to decide what is and what is not an obstruction to navigation"); *Gibson v. United States*, 166 U.S. 269, 272 (1897) (noting that in *Wheeling Bridge II*, "it was ruled that the power of congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, in the judgment of law, an obstruction of navigation"); *see also United States v. Klein*, 80 U.S. (13

The language that the Court used in *Wheeling Bridge II* is instructive:

> [T]hat part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree.

Wheeling Bridge II, 59 U.S. (18 How.) at 431-32.

In these cases, and many others, *see, e.g., Agostini v. Felton*, __ U.S. __, 117 S. Ct. 1997, 2018 (1997) (ordering the district court to vacate "a continuing injunction entered some years ago in light of a *bona fide*, significant change in subsequent law"); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992) ("A consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the par-

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Wall.) 128, 146-47 (1871) ("[In *Wheeling Bridge II*] the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us *no new circumstances have been created by legislation*." (emphasis added)); *cf. Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992) (concluding that a revised environmental statute, which mentioned specifically two pending federal cases, did not violate the Separation of Powers because it "compelled changes in law, not findings or results under old law").

ties has become impermissible under federal law."), the legislative and executive branches acted, within their powers, to alter the law, and the courts inevitably and properly adjusted their prior decrees to make the judgments conform to the law as it had come to be. *In none of these cases, however, did the political branches themselves attempt to modify a court judgment. And in none of them did they order a court to do so.* The fact that these branches undoubtedly wished to bring about the result achieved, and that they enacted the law with the expectation that the courts would inexorably be led to alter their prior rulings, in no way undermined the validity of what the political branches did . . . on their side of the constitutional line.

When, instead, the legislature has sought on its own to modify a court decree, when it has ordered the alteration or reopening of a final judgment, the Supreme Court has expressly barred it from doing so. That is precisely what *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), told us is forbidden by the doctrine of Separation of Powers. As the Court stated in *Plaut*, "We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so." 514 U.S. at 240; *see also Hayburn's Case*, 2 U.S. (2 Dall.) 408, 411 (1792) (opinion of Wilson and Blair, *JJ.*, and Peters, *D.J.*) (noting that Congress cannot interfere with the judicial determination that a claimant has a right in the future to receive a pension); *id.* at 413 (opinion of Iredell, *J.*, and Sitgreaves, *D.J.*) (same).[10]

[10] The majority emphasizes that it is not deciding the application of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), to this case, noting that plaintiffs chose not to pursue the *Klein* argument, which they

The distinction is simple and directly germane to the case before us. If the PLRA constitutionally deprives the federal (and state) courts of jurisdiction to enforce consent decrees of the sort before us, then the courts affected will necessarily refuse to give future effect to these decrees. If instead the PLRA seeks directly to order the same courts to alter, modify, or terminate the decrees themselves, then it attempts to do exactly what has never been permitted. For then it grants the legislative and the executive branches naked power over the courts and their holdings. Such a grant impermissibly crosses the fence and trespasses on the judicial terrain.

In upholding this unprecedented infringement, the *in banc* court (like the other circuits that have read the PLRA directly to terminate the consent decrees) relies on *dicta* in *Plaut*. The Court in *Plaut*, upholding the

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made to the panel, before the *in banc* court. Accordingly, the question remains open. I believe that interpreting the PLRA provisions before us to mean what the majority reads them to mean renders the provisions violative of *both Plaut* and *Klein*. In *Klein*, the Supreme Court held that the Separation of Powers doctrine is violated when Congress prescribes a rule of decision for courts to follow without permitting courts to exercise their judicial powers independently. *See id.* at 146-47. The PLRA, on the majority's reading, not only reopens final judgments by directing federal courts to cancel existing decrees, it also appears to dictate the rule of decision for a distinct group of Article III cases in violation of *Klein*.

What is deeply troubling, however, is that, although the majority today *purports* to leave the *Klein* question open, by interpreting the PLRA in the manner that it has, it precludes a future panel of this Court (faced with another challenge to the PLRA in which a *Klein* argument is pursued) from interpreting the PLRA in a manner that would avoid the grave constitutional difficulties under *Klein* that inhere in the majority's interpretation. Such a future panel will therefore be forced to address the *Klein* issues head on—and might perhaps be led to strike down the PLRA provisions that would clearly survive on the *Benjamin* panel's reading of the law. The statute would then fall—irony of ironies—as a result of the majority's desire to apply a non-existent congressional intent in the case before us.

strictest form of Separation of Powers, differentiated *Wheeling Bridge II* from the case then before it. It stated that *Wheeling Bridge II* distinguished itself, since it involved legislation that only "altered the prospective relief of injunctions," rather than a current judgment. *Plaut*, 514 U.S. at 232. I believe that the majority misreads this statement when it says that legislatures may directly terminate judgments so long as they have only future effects.

It is hard to see why it should make any difference—for the doctrine of Separation of Powers—whether the judgment of the judicial branch that is legislatively interfered with is one that has prospective effect or one that does not. In both instances, the other branches directly invade judicial territory. Nor is such a distinction needed, or even useful, in explaining *Wheeling Bridge II*. The difference, as previously noted, between present and future effects can be crucial when the legislative and executive branches have not sought to alter a judgment but have instead promulgated a law that alters the legal rules on which the judgment was based. In such cases—for example, *Wheeling Bridge II*—it is clearly to be expected that a court will modify a judgment's prospective effect. And, since there are no impediments to its doing so, that judicial modification is inevitable. *See, e.g.*, *System Fed'n*, 364 U.S. at 647 (requiring such a change); *Swift & Co.*, 286 U.S. at 114 (same). Conversely, it is rare that the courts have the authority to alter a judgment that has no future consequences. *See, e.g.*, *Agostini*, 117 S. Ct. at 2018 ("Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6) . . . ."). But when they do, the rule of *Wheeling Bridge II* would apply to these

judgments as well. *See Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 393-94 (1993) (citing with approval *Klapprott v. United States*, 335 U.S. 601, 613-14 (1949) (opinion of Black, *J.*) (permitting a judgment that had become final four years earlier to be reopened under Rule 60(b) in the interest of justice)); *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986) ("A postjudgment change in the law having retroactive application may, *in special circumstances*, constitute an extraordinary circumstance warranting vacation of a judgment." (emphasis added)).

All of these are totally different from the situation that occurred in *Plaut* (and not in *Wheeling Bridge II*). In *Plaut*, the legislative and executive branches purported to modify a judgment on their own. As such, they manifestly interfered with the judicial branch, and endangered the Separation of Powers. That, moreover, would have been so even if the judgment they abused implicated future instead of present effects. For then too, Congress and the President, by directly altering an order of the court, would have impermissibly invaded the judicial terrain. And that is precisely what *Plaut* says they may not do.[11]

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[11] Professors Tushnet and Yackle argue similarly:

> *Plaut*'s analysis suggests that *Wheeling Bridge* cannot stand for the broad proposition that Congress may alter any injunction whatsoever. That broad proposition would mean that the fundamental separation-of-powers principle articulated in *Plaut* does not apply to injunctive actions at all. But nothing in the Court's statement of the principle suggests why congressional interference with actions at law is more problematic than congressional interference with equitable remedies.
>
> The Court in *Plaut* indicated the way out . . . Federal Rule of Civil Procedure 60(b), which authorizes the federal courts to relieve parties from a final judgment for specified reasons . . .

(footnote continued)

The majority today seeks to blur the distinction by holding explicitly what most of the other circuits have held at least implicitly: that Congress may only directly affect an existing injunctive decree if the legislature both has the power to alter the underlying substantive law and has actually exercised that power in the statute at issue. *See ante* at 33. This express limitation is highly desirable in that it precludes Congress from seeking to modify prior judgments both in areas as to which it has no underlying constitutional authority (for example, diversity cases), and also in areas where it has the authority, but has not consciously chosen to exercise it. The majority's limitation, however, in no way cures the fundamental Separation of Powers defect. It remains the fact that, under the majority's ruling, the legislature is, for the first time in our history, permitted directly to order courts to modify their final judgments. And the court fails to explain why such a direct infringement is more acceptable when dealing with judgments that have long-term future effects (like injunctions) than it is as to judg-

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> [and] reflects and confirms the courts' own inherent and discretionary power.
>
> The Court's emphasis on judicial discretion, which might be understood in this context as an essential attribute of the judicial power protected by *Plaut*'s separation-of-powers holding, explains the limits of *Wheeling Bridge*'s holding. In *Wheeling Bridge* the interstate commerce clause gave Congress the power to declare that the bridge did not interfere with interstate commerce.

Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 Duke L.J. 1, 61-62 (1997) (footnotes and internal quotation marks omitted).

As Alexander Hamilton wrote in the Federalist Papers, "[the] legislature without exceeding its province cannot reverse a determination once made, in a particular case; *though it may prescribe a new rule for future cases*." The Federalist No. 81, at 484 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (emphasis added).

ments the effects of which are more proximate (like restitution or damages).

The majority's approach, moreover, highlights the manifest absurdity of ascribing to Congress the intent to affect directly the decrees in *this* case. The majority's holding means that in order to command direct termination of the decrees, Congress must have changed the underlying law so as to render the decrees unenforceable. But once it has done so—and we all agree that it has—the Supreme Court's jurisprudence, as set forth in cases like *System Federation*, 364 U.S. 642 (1961), and *Swift & Co.*, 286 U.S. 106 (1932), makes clear that lower courts are themselves obligated to comply with the altered underlying law and to cease to enforce the decrees. Why on earth then would Congress intend to do more and seek to void the decrees directly when the same result would occur anyway? And why should we read the legislature's admittedly awkward language to do this when such a reading has radical consequences for the traditional division between courts and legislatures? Indeed, the fact that the majority relies upon *System Federation* and *Swift & Co.* to make its point, *see ante* at 33-34, drives home the fact that holding that Congress terminated the decrees themselves (rather than that it altered the underlying law) does not affect the practical result in this case. It merely allows Congress gratuitously to undermine the doctrine of the Separation of Powers and invade what is traditionally the province of the judiciary.

C. The Formal Structure of Separation of Powers Doctrine

The distinction between altering the law underlying a judgment—thus leading the courts to modify a judg-

ment—and altering the judgment itself may seem a formalistic one. But that is not a valid criticism.[12] As Justice Scalia, the author of the majority opinion in *Plaut*, wrote in another context, "Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic!* The rule of law is *about* form . . . . Long live formalism. It is what makes a government a government of laws and not of men." Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation: Federal Courts and the Law*, at 3, 25 (Amy Gutmann ed., 1997) (emphasis in original). His statement applies equally here.[13]

The Separation of Powers doctrine, *Plaut* tells us, is a "*structural safeguard* rather than a remedy to be applied only when a specific harm, or risk of specific

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[12] Though the majority's approach and mine have the same effect on prisoners' rights in the case before us, the difference between us may not be totally formal. The majority's position may permit the legislature to order the precise response that the courts must make as a result of an alteration in the underlying law. Thus, the majority seems to countenance a legislative order that a decree be vacated, when in fact termination of the judgment would equally well comport with the changed law. In the instant case, the issue is of no practical significance, but it might well be in other situations. It is possible that the majority's holding means to be more limited still and that its decision allows Congress to order a specific change in a judgment *only* when that change is the sole way of adapting the judgment to the altered underlying law. If that is so, the absurdity of ascribing such an intent to Congress becomes even clearer, for then under *System Federation*, the courts are bound to make the identical change on their own.

[13] This, of course, is not to suggest that the Separation of Powers doctrine is only about formalisms. Separation of Powers notions may well make some results unconstitutional no matter how they are obtained. Thus, Congress presumably could not require Article III judges regularly to take on prosecutorial functions, regardless of whether it did so directly or indirectly.

harm, can be identified." *Plaut*, 514 U.S. at 239. And the doctrine is a "prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Id.*

It is no accident, therefore, that what some may label as "formalisms" are a mainstay of the Court's Separation of Powers and Federalism decisions. The Court's recent decision in *Printz v. United States*, __ U.S. __, 117 S. Ct. 2365 (1997), reiterated this point:

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue . . . . But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist . . . temptation . . . .

Id. at 2383 (quoting *New York v. United States*, 505 U.S. 144, 187 (1992)) (internal quotation marks omitted).

In other words, when great structural boundaries are at stake, the Court has repeatedly made clear that *how* something is done (*i.e.*, whether a judgment is directly altered or whether the underlying law is changed in such a way as to lead the courts to modify their judgments) can be at least as important as the *result* that is achieved.[14]

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[14] Nowhere is this exemplified more dramatically than in the Court's Eleventh Amendment jurisprudence. *See, e.g., Osborne v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 857 (1824) (positing the critical distinction between suing a state *eo nomine* or its officers for Eleventh Amendment purposes: "it is the party named in the record"). A person suing a state in federal court, therefore, must sue its officers as opposed

In the context of the Separation of Powers, it is the formal independence of the courts that is safeguarded by an absolute rule—never before infringed—that says that court judgments are not to be touched by the legislative and executive branches. The basic power to legislate (and to enforce that legislation) in the public interest is not undercut by this formal rule (that is, the power to achieve a *result* in terms of prisoners' rights is unaltered), but the dignity of the courts *qua courts* is protected by it.[15]

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to the state itself—even though the result is the same. Similarly, one who wishes to sue a state officer for money damages in federal court must label the suit as against the officer in his or her individual capacity; otherwise the claim is barred by the Eleventh Amendment. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (holding that the Eleventh Amendment bars claims for retroactive damages that run against the state treasury). Thus, the Eleventh Amendment protects the formal Sovereignty of the state by rules that in most cases do not alter results.

15 The same approach has been consistently applied by the Supreme Court in other areas to preserve the delicate balance among the branches of government as well as between our federal and state governments. *See, e.g., City of Boerne v. Flores*, __ U.S. __, 117 S. Ct. 2157, 2164 (1997) (striking down the Religious Freedom and Restoration Act, noting that "[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation"); *Printz*, __ U.S. __, 117 S. Ct. at 2378 (striking down portions of the Brady Act, which imposed certain regulatory obligations on state law enforcement officials, based in part on the fact that the law would effect a diminishment of the executive branch's power to administer the laws); *New York*, 505 U.S. at 187-88 (holding a federal hazardous waste law imposing obligations on states unconstitutional for compelling states "to enact or administer a federal regulatory program"); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (requiring a clear statement by Congress demonstrating its intent that the Age Discrimination in Employment Act apply to state judges); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."); *INS v. Chadha*, 462 U.S. 919, 958-59 (1983) (striking down a single-house legislative veto of executive decisions respecting the suspension of alien deportation orders); *id.* at 964 (Powell, *J.*, concurring in the judgment) (finding that the exercise of the legislative veto with respect to six individuals was "clearly adjudicatory"). In *Printz*, the Court posited that the "separation

D. What the PLRA Intended To Do

Thus, if we were to conclude that Congress intended by the PLRA directly to terminate the consent decrees, and thereby on its own to modify judgments, we would have to face the question of whether such a radical step was constitutionally permitted despite its patent infringement of the line that divides the courts from the other branches. But, as we have seen (as the *in banc* majority itself admits, and as the panel argued at length), the language of the statute requires no such interpretation. *See ante* at 24-26; *Benjamin*, 124 F.3d at 167. Is that reading nonetheless mandated by the legislative history of the PLRA? I think not.

Let me be clear that I am not, in this respect, simply relying, as did the panel, on the mass of cases that suggest (properly) that statutory language should be read to avoid serious constitutional difficulties,[16] though those cases would certainly be enough to justify my reading. In the case before us, the argument against the existence of a congressional intent to terminate the consent decrees finds a far simpler grounding. If—as I believe

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of the two spheres is one of the Constitution's structural protections of liberty." 117 S. Ct. at 2378. And it declared that the separation and independence of the branches provide a commensurate and equally important structural protection. *See id.* (citing *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961); The Federalist No. 28, at 180-81 (Alexander Hamilton)).

[16] *See, e.g., DeBartolo v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *cf. Almendarez-Torres v. United States*, __ U.S. __, 118 S. Ct. 1219, 1228 (1998) ("[T]hose who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held unconstitutional. Only then will the doctrine serve its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made. For similar reasons, the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled . . . .").

can be demonstrated—everything that Congress sought to achieve by this part of the PLRA is as well accomplished by terminating the future effects of the decrees as by destroying the judgments themselves, it is ill-advised to suppose that Congress, by its ambiguous language, meant to do something that raises such severe Separation of Powers problems.

Before one assumes that, regardless of results, Congress intended to be so radical, one must, I suggest, have some direct indication that the legislature wanted specifically to infringe on the dignity of the courts, and to do so despite the formal requirements of the Separation of Powers doctrine. One must, in other words, have a clear sign that it did not merely wish to achieve certain ends with respect to prisoner litigation. Yet, neither the *in banc* court, the First Circuit, nor any other court that has dealt with these provisions of the PLRA has cited anything that Congress might have tried to accomplish by this part of the PLRA that is not obtained precisely to the same degree regardless of whether the decrees are themselves terminated or, instead, the federal and state courts are denied jurisdiction to give the decrees future effect.

The *in banc* majority argues at length that Congress meant to get the federal courts out of the business of running jails, and it cites any number of congressional statements to that effect. I agree. But whether the consent decrees before us are terminated (or, for that matter, vacated) makes no difference whatsoever in this regard, so long as it is the case that federal courts are denied jurisdiction to give future effect to the decrees. And that is precisely what will occur under my alternate reading of the statute.[17]

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[17] This, of course, is only true in either instance where the need-narrowness-intrusiveness standard is not met. *See* 18 U.S.C. § 3626(b)(3).

The majority states that Congress sought to preclude *state* courts—as well as federal ones—from giving future effect to the decrees. It therefore interprets the PLRA as preventing a prisoner (barred from getting enforcement of the consent agreement in federal court) from going to state court and getting the decree enforced there. *See ante* at 22. But, once again, the posited congressional aim is as readily accomplished by giving the statutory language its natural meaning so that the PLRA (by limiting the jurisdiction of state as well as federal courts) terminates future relief under the decrees as it is by ending the decrees themselves.

There remains the question of whether Congress intended to prohibit state *contract* suits designed to vindicate prisoner claims that might also be recognized in the decrees. And that question, which is the second issue as to which I disagree with the majority, is a complicated one about which I will have more to say anon. For purposes of the issue that I am currently addressing, however, the question can be dealt with quickly. The survival of state law contractual rights *vel non* is unaffected by whether the decrees themselves are terminated or whether, instead, future relief *under the decrees* is forbidden in both state and federal courts. The issue of whether private state contractual rights perdure remains the same on the reading that would end the decrees themselves and on the reading that would not directly touch the judgments but would bar federal and state courts from granting future relief under them.[18]

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[18] It is not, moreover, harder to say that such rights are abrogated if the decrees themselves are left untouched and only their future effects are affected than it is to say that they do not survive if the decrees are deemed terminated. *See infra* Part II.B.

It follows that it makes no sense to assume that Congress intended under the PLRA to do something never before done. Since everything it wished to achieve is as fully accomplished by less radical methods, courts should not just hesitate, *they should be bound to refrain*, from giving the congressional language an awkward (though not impossible) reading, which, having no purpose, constitutes a gratuitous contravention of the boundaries established by the Separation of Powers doctrine.

E. Are the Limitations Imposed by the PLRA on State and Federal Court Jurisdiction Constitutional?

Before I turn to the second issue in this case—the survival of state law contractual rights under the PLRA—I must briefly address the question of whether Congress can constitutionally do what I read the PLRA as doing, namely limit severely the jurisdiction of both federal and state courts so as to bar most prospective relief under the consent decrees involved in the case before us. If Congress can so restrict the courts' jurisdiction, then—as I have just argued—the same results are achieved under my reading of the statute as under that of the *in banc* majority. If not—if the only way Congress can control the actions of state or federal courts is by terminating the decrees themselves—then my argument that Congress could not have intended the radical step of directly altering a court judgment would be seriously undercut. Fortunately, there can be no doubt that the restrictions on both federal and state court jurisdictions that I believe the PLRA mandates are constitutionally valid.

Whatever may be the outer boundaries of Congress's power to restrict the jurisdiction of the lower federal

courts,[19] there is no question that the power of such courts can be limited to cases involving federal rights. *See Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). The PLRA affects only cases in which there is no finding that the "relief is . . . necessary to correct the current and ongoing violation of the Federal right" by "the least intrusive means" possible. 18 U.S.C. § 3626(b)(3). Hence the validity of such a restriction of jurisdiction cannot be seriously questioned. *See ante* at 36-38; *Benjamin*, 124 F.3d at 169-70.

The issue is only slightly more complicated with respect to state courts. What, one might ask, is the constitutional basis for a federal limitation on the jurisdiction of state courts? The answer is that the PLRA prohibits state courts from giving effect to relief only when that relief is embodied in consent decrees that were entered into in settlement of suits claiming federal rights. Because the suits that culminated in the federal court decrees involved such "national" rights, Congress both directly and under the Necessary and Proper Clause can bar state courts from giving future relief under them. The original claims that gave rise to the decrees were federal ones, and Congress, which has authority over such claims, surely can restrict *any* court from giving

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[19] *See, e.g.*, *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) ("[N]othing in the Constitution . . . requires Congress to confer equity jurisdiction on any particular inferior federal court."); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (upholding the provision of the Norris-LaGuardia Act limiting the ability of the federal courts to grant injunctive relief, and noting that "[t]here can be no question of the power of Congress . . . to define and limit the jurisdiction of the inferior courts of the United States"). *But see* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1397 (1953) (positing constitutional limits on Congress' control of federal court jurisdiction).

future relief in exchange for their relinquishment. The question is, therefore, not one of federal *power*—the power is there. It is one of whether Congress intended to use that power. And the majority holds that Congress did indeed intend such a limitation.[20]

I conclude, therefore, that everything that Congress, by its language and by its intent as expressed in the legislative history of the PLRA, wished to accomplish can be constitutionally effectuated without reading the statute to order a direct infringement of court judgments.[21] Since the statute in no sense *requires* such a

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[20] While the panel disagreed, I do not think that the majority is clearly wrong is its holding. The words of the statute barring future relief under the decrees are not expressly limited to federal courts. And there is some legislative history indicating that Congress foresaw the possibility of attempts to obtain future relief under the decrees in state courts and wished to forbid it. *See supra* Part I.A. Together these are enough to make plausible the conclusion that future relief based on the decrees was meant to be made unavailable in either set of courts.

[21] Since the majority interprets the PLRA as directly requiring the termination of the decrees at issue while I read the statute as doing no more than changing the underlying law so as to bar prospective relief under the decrees, it may seem strange that I concur in the court's holding "terminat[ing] [the] forward-looking provisions of [the] consent decrees." *Ante* at 45. But, in fact, even under my reading of the PLRA, the court's result remains appropriate.

In *System Federation*, the Supreme Court instructed the lower courts to respond to legislative changes in underlying laws by opening and amending judgments that were still in their control. It follows that after the PLRA has, on my interpretation, prohibited future enforcement of the consent decrees before us, the courts are bound to react to that change. They may in principle do so in one of at least three ways. First, they may decide to do nothing and, leaving the decrees in place, decline to enforce their forward-looking provisions. Second, they may do what the district court and various other circuits have done and conclude that the best judicial reaction to the prohibition on future enforcement is to vacate the decrees themselves. (The fact that the statute does not mention vacatur no more precludes that reaction than did the fact that the statute at play in *Wheeling Bridge II* never mentioned the previous injunction keep the *Wheeling Bridge* Court from dissolving that injunction.) Third, they may

reading, and since such a reading can properly be viewed as "awkward" and "not natural," it seems to me extraordinarily misguided so to interpret the Act. In doing this, the *in banc* majority (and the other circuits that have done the same) permits the constitutional walls between the judiciary and the other branches of government to be breached—and does so for no reason. A panel of the Ninth Circuit gave the same reading in order to strike the statute down.[22] It is hard to know which approach is more damaging to the genuine will of the Congress and to our constitutional structure.

II. DO PRIVATE STATE CONTRACT CAUSES OF ACTION SURVIVE THE PLRA?

The second issue that divides me from the *in banc* majority is whether a state court can (after passage of the PLRA) determine that the prisoners before us, at the same time that they entered into consent decrees, also reached a meeting of minds with the entities that they

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decide that the most appropriate response to the new law is for the courts themselves to order the forward-looking provisions of the decrees terminated.

The effect on prisoners' rights of all three of these reactions is essentially the same, but the third solution strikes me as the most appropriate response. The statute expressly authorizes the parties to go to court and seek termination of such forward-looking provisions. *See* 18 U.S.C. § 3626(b)(2). And there seems to me to be no reason why the courts should not grant precisely this relief. Accordingly, my reading of the PLRA justifies a *court* order "terminat[ing] [the] forward-looking provisions of [the] consent decrees." The majority believes that the statute itself commanded termination. The effect being the same, I concur in the court's result.

22 *See Taylor v. United States*, 143 F.3d 1178, 1184 (9th Cir. 1998). The Ninth Circuit has withdrawn the panel opinion in *Taylor*, and has reheard the case *en banc*. *See Taylor v. United States*, 158 F.3d 1059 (9th Cir. 1998) (en banc) (withdrawing panel opinion and granting rehearing en banc).

had sued and that this meeting of the minds constituted a contract that, in the normal course of things, could be enforced in state courts. The question is properly divided into three parts: (1) Can parties to a consent decree be said under state law to have, independently of that decree, entered into a valid contract—at least in some circumstances? (2) If such a contract would—in some instances—be valid under state law, does the PLRA prohibit its enforcement in state courts? (3) What, if any, restrictions would a finding that valid state contracts existed place on future actions by state legislators with respect to such contracts?

I contend that the *in banc* majority's answer to the first question is probably wrong and, more important, improperly attempts to decide a question that is purely one of state law, thereby offending the most fundamental principles of Federalism. The answer to the second question is more complicated. Congress surely has the constitutional authority to prohibit the enforcement of otherwise valid state contracts when such contracts are entered into in circumstances like those before us. But, on the language and history of the PLRA, it is unlikely that Congress intended to prohibit such state law contracts. More fundamentally, since the issue is not before us in the current case, we cannot and should not decide it.[23] The answer to the third question is that very few

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[23] The majority's opinion, in this respect, is entirely advisory and is not needed for its holding. Nor can its foray be justified under the guise of correcting analogous dicta in the panel opinion. In the first place, the panel's discussion of the possible survival of state law claims was not dicta. It was made necessary by the panel's conclusion that, without the possibility that such state claims might survive, the PLRA might well be unconstitutional on various grounds. *See, e.g., Benjamin*, 124 F.3d at 176. The majority rejects these constitutional claims without hesitation. That, it has a perfect right to do. But once it has done so, any further discussion of possible state law actions becomes totally unnecessary. *See Almendarez-Torres v. United States*, __ U.S. __, 118 S. Ct. 1219, 1228

restrictions would impede state legislatures from modifying such contracts.

A. *Can Parties to a Consent Decree Enter into a Separate and Potentially Valid State Law Private Contract?*

The question of whether the parties, at the same time that they concluded the consent decrees, also achieved a meeting of minds such that a state might deem a state law contract to have been established, is—by definition—a state law issue. It is a totally different question from whether a federal *consent decree* can itself be enforced in state courts. By conflating the two issues, the court permits itself to cast doubt on whether such a requisite meeting of the minds can exist. But that is not for a federal court to say. What New York deems a valid contract is for New York to decide. And for federal courts to instruct New York on what does or does not constitute a proper meeting of the minds under New York law is as grievous a crossing of the boundaries imposed by Federalism[24] as the direct legislative alteration of a court judgment is of the boundaries imposed by the Separation of Powers.

Moreover, it would not be surprising if New York determined that at least some of the many consent decrees whose future effects the PLRA seeks to terminate did in fact give rise to state law contractual rights.

(1998). The most that might be justified, to avoid any lingering confusion arising from the panel's analysis, would be a statement to the effect that "since the *in banc* court finds the statute to be constitutional regardless of the existence of possible state law claims, it expresses no opinion on the matter and should not be read as agreeing with the panel's analysis of such claims." *See infra* notes 26, 28.

[24] *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (requiring a clear statement from Congress before a federal statute will be read to apply to state officials).

In this respect, it is important to realize that the consent decrees that may be affected by the PLRA are many and highly varied in New York alone. A few—like the ones in the case before us—have generated a huge cavalcade of judicial administration and contain terms that were the result of continuous evolution and articulation over many years.[25] Many others simply settled a claim by giving the prisoner claimants a particular future benefit, and have lain judicially dormant ever since. To make a one-size-fits-all abstract judgment with respect to such differing agreements, as the majority appears to do, seems wrong to me. And it would be wrong even if the majority had the authority to do it.[26]

In the end, though, the essential point remains the same. For federal courts to tell states what they may, or should, or might consider to be contractually enforceable

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[25] The panel opinion noted, for example, that the decrees in the instant case

> have generated a judicially administered structure comprising over ninety related court orders and extending to more than thirty discrete areas of prison administration. The areas include the handling of detainees' mail and property, cell and body searches, maintenance of the physical plant, food service, and health and sanitary issues. . . . In 1982, pursuant to the agreement of the parties, a court monitoring agency called the Office of Compliance Consultants ("OCC") was created. The OCC has monitored compliance with the Consent Decrees since that time.

Benjamin, 124 F.3d at 165.

[26] The Third Circuit has recently reached the same conclusion in *Imprisoned Citizens Union v. Ridge*, __ F.3d __, 1999 WL 93802, at *1 (3d Cir. Feb. 25, 1999):

> If the Inmates have valid contractual claims that survive termination, such claims are "based solely upon . . . [Pennsylvania] law". . . . The Inmates are therefore free to pursue relief in the Pennsylvania courts. It is not our province to speak to the validity of any "claims arising under [Pennsylvania] law," or to award relief therefor.

Id. at *11.

rights is simply not proper. The *in banc* court's opinion seems to do this, and I can only conclude that in its understandable eagerness to make clear that *the consent decrees themselves* are not enforceable in state courts, it went beyond what it can appropriately decide without perhaps intending to do so.[27] Moreover, since we cannot rule on what is outside our authority to determine, I believe that the statements by the *in banc* court with respect to the existence of such state law contracts, necessarily, have no legal effect.

B. Does the PLRA Constitutionally Ban the State Courts' Enforcement of Contracts That Would Otherwise Be Valid Under State Law?

Holding that state law must decide whether a contract (enforceable in state courts) could have been created by the same circumstances that gave rise to the consent decrees, however, does not resolve the issue before us.

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[27] The panel opinion, in noting that some of these decrees might constitute state law contracts that could be enforced in state courts, observed that a federal question would arise if state courts discriminated against those contracts embodied in federal consent decrees, or those that were entered into in exchange for the giving up of federal claims. *See Benjamin*, 124 F.3d at 178-79 & n.23. That is surely correct, *cf. Howlett v. Rose*, 496 U.S. 356, 367-72 (1990) (holding that state courts' refusal to entertain a § 1983 claim against a school district when state courts entertained similar state-law actions against state defendants violated the Supremacy Clause), but can be misunderstood. The point that the panel sought to make was *not* that state courts were bound to find valid state contracts embodied in the consent decrees. Far from it. All the panel said was that a state that held certain agreements *to be valid state contracts* could not discriminate against identical meetings of the minds and refuse to enforce them, simply because they were entered into in exchange for federal claims. State law can and must determine what it deems to be valid contracts and can do so fully and without the kind of interference that I suggest is implicit in the *in banc* court's opinion. What state law cannot do, without raising significant federal questions, is to refuse to enforce one of two or more otherwise valid contracts simply because that contract involves federal rights.

We must also ask—even if the conduct of the parties gave rise to a state law contract—whether that agreement was made unenforceable by the PLRA. And this question itself divides into three parts: (1) whether federal law can constitutionally bar enforcement of otherwise valid state law contracts like the ones before us, (2) whether it did so through the PLRA, and (3) whether this question is properly before us.

The answer to the first question is an easy yes. For the same reasons that federal law can bar state courts from giving future effect to these consent decrees, it can also bar enforcement in state courts of contracts that have arisen, if at all, in circumstances like those involved in the instant case. The contracts that state law might deem to have been made are all agreements for which the alleged consideration was the giving up of federal claims (and usually federal constitutional claims). There can be no doubt that Congress—if, for instance, it wished to discourage parties from too readily abandoning federal constitutional claims—could validly make unenforceable all contracts that waived or otherwise gave up such claims. One may question if that is what the Congress that passed the PLRA had in mind—but that is another issue. What one cannot deny is that the federal government can control the abandonment of federal claims and can do so, if it wishes, by barring even *state* court enforcement of contracts that were negotiated in exchange for those claims.

The issue then becomes whether Congress did so under the PLRA. On the whole, I do not believe that it did. But, ultimately, this is not a question that is properly before us in this case, and we should therefore not attempt to answer it definitively now.

Whether Congress did so or not depends on the reading that is given to two seemingly contradictory clauses of the PLRA. The PLRA states:

> (c) Settlements.—
>
> (1) Consent decrees.—In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).
>
> (2) Private settlement agreements.—
>
> (A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.
>
> (B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

18 U.S.C. § 3626(c).

Paragraph (c)(2)(A) appears to permit a private settlement agreement only "if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled." As such it would seem to bar state law contract remedies, since these typically go well beyond permitting the reinstatement of the suit settled by the contract.

Paragraph (c)(2)(B), however, immediately limits (c)(2)(A) and states "[n]othing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court *any*

remedy available under state law" (emphasis added). And this paragraph clearly seems to indicate that all state law remedies remain available, including those that go beyond a reinstatement of the suit that the contract sought to settle. The very next paragraph of the statute, moreover, states: "[t]he limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law." *Id.* § 3626(d).

How is one to reconcile these provisions? It seems likely that paragraph (c)(2)(A), when it limits court enforcement to "the reinstatement of the civil proceeding that the agreement settled," *id.* § 3626(c)(2)(A), is referring to *federal* court enforcement. In the prior paragraph the "court" whose power to grant a consent decree is being restricted manifestly refers to the federal court. And when succeeding paragraphs speak of the right to receive any remedy available under State law, the "court" in which these remedies can be obtained is instead expressly described as a "State court." *See, e.g.*, *id.* § 3626(c)(2)(B).

For these reasons, I believe the better reading of these provisions is likely to be that the PLRA, whatever it meant to do to the consent decrees themselves or to future relief under them, did not also intend to prohibit or limit state contracts made in settlement of federal claims. It follows, therefore, that *if* a state court were to deem the meeting of minds that led to the consent decrees to be sufficient to give rise to valid state law contracts, the PLRA does not appear to bar local law enforcement of such local law claims. It does not seem to bar it, not because Congress could not do so constitutionally, but because Congress appears not to have precluded the suits.

In the end, though, this is a question that we should not decide at this time. We do not know whether any, some, most, or none of the consent decrees (whose future effects the PLRA sought to limit) arose in situations out of which state courts will find valid state law contracts also to have been made. Unless and until a state court finds that a valid state law contract exists, it is premature for us to rule on whether the PLRA would bar the local courts from enforcing such a contract. Since, moreover, the parties seeking relief before us have not asked for any preclusion of state court contract claims—they only seek termination and vacatur of the decrees—it would be improper for us to rule on the issue even if it were not premature. Once again, the question is not before us.[28]

* * * *

There remains one important point to be made with respect to state law contract claims. It is that the existence and survival of such state law claims under the PLRA is completely independent of whether the consent decrees are vacated, terminated, or left in place (with

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[28] The Third Circuit, in dicta, twice asserted that the PLRA does not bar such potential state contract actions. *See Imprisoned Citizens Union*, 1999 WL 93802, at *11 ("If the Inmates have valid contractual claims that survive termination, such claims are "based solely upon . . . [Pennsylvania] law," and are not affected by the PLRA. . . . The Inmates are therefore free to pursue relief in the Pennsylvania courts."); *see also id.* at *12 n.6 ("We express no opinion as to whether the Inmates have private rights in the consent decree. *See infra*, Section II.C.2. We simply note that if they do, those rights exist under state law and are not affected by the PLRA. *See* 18 U.S.C. § 3626(d) ('The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.')."). That Circuit appears to be as certain of this conclusion as the majority here, in dicta, is of the opposite result. The existence of these conflicting obiters underscores the wisdom of not trying to decide the issue until it is firmly presented in a case in which full arguments on both sides are made. *See ante*, concurrence of Judge LEVAL.

both federal and state courts barred from giving relief under them). If (as several circuits have held) the PLRA *vacates* the decrees, this in no way means that state courts cannot find that a valid contract (independent of the decrees) had been formed and was enforceable under state law. Indeed, such a state law finding would seem to fit precisely under the saving clause of § 3626(d) since by definition once the decree was vacated the claim could *only* be "based solely upon . . . State law," given that no federal claims would be left. And the same would be true if the decrees were terminated, as ordered by the *in banc* (and First Circuit) holding. Once again any "relief entered by a state court" would have to be "based solely upon [contract] claims arising under State law." For here too, once the decrees were terminated, the claims would have no other basis.

It might be tempting to say that under the interpretation of the PLRA that bars future relief under the decrees but does not terminate them, the validity of state contract claims is, if anything, more doubtful. After all, if the decrees remain extant, it might seem at least plausible that the "relief entered by a State court" was *not* "based solely upon claims arising under State law" (and hence be permitted) but could, in part, derive from the still unterminated decrees (and hence be barred). But, in fact, that is not possible. On this reading, the PLRA bars all *relief* under the decrees (in state as well as federal courts). It follows that, also on this interpretation, any "relief entered by a State court" must be "based solely upon claims arising under State law."

Thus, nothing in the discussion of the possible existence of state law contracts alters what I said earlier when considering the Separation of Powers issue. Since the existence and survival of state law claims is inde-

pendent of whether the decrees are obliterated or are left in place (and only prospective relief is barred), precisely the same result obtains whichever reading is given to the PLRA.

C. What if Any Restrictions Would a Finding of Valid State Contract Claims Impose on State Legislatures?

At oral argument, it was suggested that, if we were to hold that state law contracts could continue to give the relief that was no longer available under the consent decrees, states would be forever frozen into agreements into which they had foolishly entered, even when those agreements were no longer in the public interest. Such an argument, however, misperceives the degree to which a contract binds the state as Sovereign.

As I said at the beginning of this opinion, the Sovereign cannot contract away its powers to govern. It cannot do that any more than it can be precluded from governing by a court judgment or by a consent decree. If the public interest requires it, the Sovereign can pass laws in derogation of any of these, subject only to the constitutional limits that apply to its lawmaking generally. Thus, the federal government can act in derogation of contracts that it has entered into, so long as it is operating under one of its paramount powers and so long as it does not violate any constitutional prohibition, such as those of the Bill of Rights. Similarly, the states can pass laws limiting the effect of their own contracts so long as, in doing so, *they* do not violate any express constitutional prohibitions or valid federal laws.

The fact that the Sovereign is itself a party to a contract is not irrelevant, but it is also in no way determinative. Courts will look with greater skepticism when

the Sovereign is a party to a contract and seek to determine whether the government's actions are those of a contracting party trying to get out of a financially bad deal or whether, instead, the government is acting as Sovereign in the public interest. *See* Calabresi, *supra*, 71 Yale L.J. at 1203.

This, in the case of the federal government, means that the courts will not *seek* out a paramount power that would validate the government's action, when that action enables the government to renege on an unfavorable contract. But it also means that the federal government can nonetheless abrogate a contract that is financially disadvantageous to it, if the statute doing so points out the paramount power and the public interest served by the abrogation. *See Resolution Trust Corp. v. Federal Sav. & Loan Ins. Corp.*, 25 F.3d 1493, 1501 (10th Cir. 1994) (noting that where the federal government is a party to a contract, a statute modifying the contract will be subjected to the "sovereign acts" doctrine, under which Congress may abrogate contracts through general legislation, but may not target a class of contracts to which it is a party); *see also United States v. Winstar Corp.*, 518 U.S. 839, 898 (1996) (Souter, *J.*) (plurality opinion) ("The greater the Government's self-interest, . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence . . . ."); *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 472 (1985).

The same reasoning applies, *mutatis mutandis*, to the states, whose sovereignty is both broader and more constricted than that of the federal government. The not unduly burdensome restrictions of due process remain and restrain both Sovereigns to some degree. But, in the

end, it should be clear that even if state contract law recognizes a valid agreement between the parties before us, and the PLRA does not itself bar enforcement of the agreement in state courts, this in no way precludes the state of New York, acting as Sovereign in the public interest—and not solely as a contractor looking after its pecuniary interest—from modifying or even doing away with the contract.

III. A CAUTIONARY NOTE

Having concluded first that the PLRA does not terminate the consent decrees themselves but only ends future relief (either in state or federal courts) under them, and second that the state law of contracts might give relief analogous to that which is no longer available under the decrees and that such relief is not obviously barred by the PLRA, I am bound both by comity and the respect that I feel for my siblings to give weight to the fact that my views have found no adherence among the other circuits and have been forcefully rejected in my own court. I have done so. But in the end, I still believe that extremely able judges with the best of intentions have decided these issues incorrectly and that there are plausible reasons explaining why this has happened. It is to those reasons that I turn in concluding this opinion.

The first reason is that we all have been trained to downplay the significance of formal rules and to concern ourselves predominantly or even exclusively with results. We tend to look at law primarily as an engine to achieve immediate goals, and to ignore its symbolic significance. Thinking this way, it is all too easy to equate (a) the termination of judicial judgments with (b) changes in underlying laws, when both bring about the same results. But in fact we are wrong.

Of course, results do matter too. But they are not the only things that count. Symbols and formal boundaries can also be deeply important. And an overly functional view of the law can lead to grievous errors. For example, are distinctions expressly based on race the same as rules that have disparate impact on different racial groups? Of course not. This is not to say that disparate impact may not, in some circumstances, be constitutionally or legislatively prohibited.[29] And, indeed, I have urged a greater recognition of the potential constitutional frailty of some arrangements that create disparate impacts. *See* Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 Harv. L. Rev. 80, 115 n.106 (1991).[30] But the fact that some disparate *results* may be invalid, regardless of *how* they are achieved, does not mean that the converse is true. It in no way suggests that, even when results can withstand constitutional scrutiny, there are not some *ways* of achieving the same goals that are barred by the great Charter. The means of

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[29] *See, e.g., Shaw v. Reno*, 509 U.S. 630, 645 (1993) (noting that, in voting rights cases, "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption"); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (holding that, under Title VII, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices").

[30] *See also United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, *J.*, concurring) ("If Congress, for example, though it was made aware of both the dramatically disparate impact among minority groups of enhanced crack penalties and of the limited evidence supporting such enhanced penalties, were nevertheless to act affirmatively and negate the Commission's proposed amendments to the Sentencing Guidelines (or perhaps were even just to allow the 100-to-1 ratio [of sentences for crack cocaine to sentences for powder cocaine] to persist in mandatory minimum sentences), subsequent equal protection challenges based on claims of discriminatory purpose might well lie.").

accomplishing the ends—whether they be expressly race-conscious distinctions, suits for damages directly brought against the states, or legislative abrogations of court judgments—may fall *in and of themselves*, because to permit them is to allow something whose symbolism is intolerable, and remains so even when an identical result, achieved in other ways, may perhaps be permitted.

Nowhere is this more true than with respect to Separation of Powers. Despite the Supreme Court's ringing formalistic language in this regard, functionalist judges—as all of us tend to be—are reluctant to follow the Court's lead. And this carries particularly harmful consequences when Separation issues are involved. For, in this area, we cannot rely on any other institution of government to guard the formal boundaries. It is illusory to expect that the legislature or the executive will mind the fence, especially when it is the judiciary's symbolic terrain that is trespassed upon. It is equally illusory to count on the parties to care about formal Separation of Powers notions. When these notions do not affect the result, the parties will not be much interested.[31] If the Separation of Powers—and especially that involving the judiciary—is to be protected in its formal and symbolic importance, the courts must be the guardians. But to do so we must—at least in part—overcome the functionalism that we were all taught.

The second reason for the errors that I believe the *in banc* court's opinion makes stems from federal judges' too ready assumption of their own capacity to ascertain

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[31] This was manifest during the *in banc* oral argument in the instant case, at which the plaintiffs expressed little concern with whether the decrees themselves, or only relief under them, would be terminated. The fact that for this reason parties rarely raise or argue such distinctions of course makes it harder for the courts to recognize them.

state law. One of the great defects of diversity jurisdiction—which I tend to defend—is that all too often it gets federal judges into the business of determining what the law of the states is.[32] And courts that in ordinary cases believe that they can easily decide what state contract law is may be tempted, as I believe the *in banc* court was today, to decide what is not for us to say—whether a state should or should not find that a contract exists.

The third reason most circuits have read the PLRA incorrectly has to do with what I think is an unfortunate view commonly taken of legislative history. I am not one who holds that words always or even frequently explain themselves. But that does not mean that specific pronouncements by legislators are free from even greater dangers as sources of legislative intent.[33] All in all, when one must move beyond legislative language, it is often best to do so in the way that was traditional in the English courts. Barred from citing Hansard—the British parliamentary materials—the English courts focused on "the mischief" that a statute sought to cure.[34] Having identified

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[32] To avoid that bad habit, I have argued that we should be much readier to certify questions of state law to state courts. *See McCarthy v. Olin Corp.*, 119 F.3d 148, 157-61 (2d Cir. 1997) (Calabresi, *J.*, dissenting). But that practice remains relatively infrequent. *See* John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 Vand. L. Rev. 411, 418-31 (1988); *accord* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. Pa. L. Rev. 1459, 1549 (1997) (observing that certification is discretionary and occurs on an ad hoc basis within the circuits).

[33] *See, e.g., Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527-30 (1989) (Scalia, *J.*, concurring in the judgment).

[34] *See, e.g., Heydon's Case*, 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (1584) (noting that "the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy"); *accord Gorris v. Scott*, L.R. 9 Ex. 125 (1874); *see also Millar v. Taylor*, 98 Eng. Rep. 201 (1769) (first announcing the rule that courts may not consult Parliamentary material as an aid to statutory construction).

the mischief, they read the words of the law in its clarifying light. Had the various circuits focused on the "mischief" that the PLRA was trying to overcome, they would, I submit, have been far readier to accept a reading of the statute that barred the future effects—state or federal—of the decrees, but did not terminate the decrees themselves.

The final reason why, in my view, many judges get this case wrong stems from an error that is commonly made in dealing with statutory language. Thus, the *in banc* court readily acknowledges the ambiguities that characterize the operative language of the relevant part of the PLRA. But when the court looks at the definitional section of the law, it deems itself bound by the words used without considering the possibility—patently true in this case—that the definitions are themselves ambiguous. It is as if, when dealing with definitions, legislative language were necessarily clear and therefore had to be read as if it were, despite the manifest abuse of words that such a reading entails.

I would suggest, instead, that definitional parts of a statute, like the rest of the statute, must be given their ordinary meanings, when such meanings make sense, but must be read in their context, with a view toward the *mischief* the statute addresses, when the seemingly ordinary meanings lead to statements that are—to put it mildly—linguistically unnatural. The definition of "relief" in the PLRA, which purports to include in relief "consent decrees" and also to exclude from relief "private settlement agreements," makes no sense. It is bizarre because even if "consent decrees" might (awkwardly as the *in banc* court recognizes) be termed relief, "agreements" are

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Recently, amidst a heated debate, the English courts have (perhaps influenced by the American courts) begun to consult Hansard. *See, e.g., Pepper v. Hart*, 1 All E. R. 42 (1993).

simply not a form of relief. And hence to exclude them would be, if that is what the definition means, an exercise in surplusage and in futility.[35] Read to make sense and read in the light of the mischief to be cured, the definitional section must mean that the relief to be barred in the future includes all relief *available under or pursuant to* consent decrees but does not include *that relief which is available or pursuant to* private settlement agreements. Such an elision would be readily assumed in reading the operative language of a statute if it were needed to make the statute make sense. Why should it not equally be read back into the definitional section of a law, when to do so accomplishes what the statute was passed to do, preserves the formal boundaries between the branches of government, and makes the definition parse?

* * * *

Because I believe the reading given to this statute by the *in banc* court distorts language, presumes a most unlikely congressional intent, improperly seeks to decide questions of state law, and, most important, does grievous damage to the formal lines that separate the coordinate branches of our government and does it to no purpose whatsoever, I respectfully dissent from most of the court's reasoning. Because I agree with the court on why the case must be remanded to the district court, I join Part IV of its opinion. And because—despite what I believe to be a profoundly incorrect discussion—there is little in the court's actual result that I would not also reach, I concur in its judgment.[36]

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[35] As I suggested earlier, a legislature can tell us to treat a banana the same way as an apple. But if it seems to say that a banana *is* an apple, we should not hesitate to try to figure out what it really meant to say.

[36] *See supra* note 21.

FILED
DEC 23 1997
GEORGE LANGE III, CLERK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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James Benjamin

Plaintiff-Appellant,

v. 96-7957

Michael Jacobson,

Defendant-Appellee.

- -

A petition for rehearing containing a suggestion for a rehearing in banc having been filed by appellant, and

A poll of the judges in regular active service having been requested and taken, and a majority of the active judges of the Court having voted to rehear the appeal in banc,

It is hereby ORDERED that the appeal will be reheard in banc.

The in banc court will consist of the active judges of the Court and Judge Oakes. See 28 U.S.C.§46(c).

The appellant's brief shall be filed by January 14, 1998, the appellee's brief shall be filed by February 13, 1998, the appellant's reply brief shall be filed by February 20,1998, and oral argument will be held at the United States Courthouse, Foley Square, at 1:30 p.m., February 25, 1998.

FOR THE COURT

s/ Lucille Carr
GEORGE LANGE III, Clerk

Dated: December 23, 1997

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 928—August Term, 1996

(Argued: November 15, 1996 Decided: August 26, 1997)

Docket No. 96-7957

JAMES BENJAMIN,

Plaintiff-Appellant,

—v.—

MICHAEL JACOBSON, Commissioner of the Department of Correction of the City of New York,

Defendant-Appellee.

Before:

OAKES, CALABRESI, *Circuit Judges*, and HAIGHT, *District Judge*.*

Appeal from an order of the United States District Court for the Southern District of New York (Baer,

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* The Honorable Charles S. Haight, Jr., Senior District Judge of the Southern District of New York, sitting by designation.

Judge) upholding the constitutionality of the termination provision of the Prison Litigation Reform Act and vacating the consent decrees and all supplemental orders in these consolidated cases pursuant to that provision.

Affirmed in part and reversed in part.

JOHN BOSTON, The Legal Aid Society Prisoners' Rights Project, New York, N.Y. (Daniel L. Greenberg, Sarah Kerr, Dori A. Lewis, Marta Nelson, of counsel), *for Plaintiff-Appellant.*

LORNA B. GOODMAN, Corporation Counsel's Office, New York, N.Y. (Paul A. Crotty, Corporation Counsel, June R. Buch, Laura A. Chamberlain, Florence A. Hutner, Elizabeth I. Freedman, of counsel), *for Defendant-Appellee.*

SARAH L. SHUDOFSKY, Assistant United States Attorney, Southern District of New York (Mary Jo White, United States Attorney, Southern District of New York, Frank W. Hunger, Assistant Attorney General, Civil Division, Department of Justice, James L. Cott, Assistant United States Attorney, Southern District of New York, Robert M. Loeb, Appellate Staff, Civil Division, Department of Justice, of counsel), *for Amicus Curiae Intervener United States of America.*

CALABRESI, *Circuit Judge*:

I. BACKGROUND

This case concerns the applicability of the recently enacted Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (the "PLRA" or the "Act"), to a set of consent decrees and supplemental orders (collectively the "Consent Decrees") entered into by New York and by pre-trial detainees in the New York City jails. The main question before us is the constitutionality of a provision of the PLRA under which motions can be made for the immediate termination of "prospective relief" mandated by the Consent Decrees. 18 U.S.C. § 3626(b). After determining that the termination provision was constitutional, the district court below vacated the Consent Decrees. *Benjamin v. Jacobson*, 935 F. Supp. 332 (S.D.N.Y. 1996).

We agree that the termination provision is constitutional. We specify, however, that section 3626(b) is clearly constitutional only if it is interpreted as simply constricting the jurisdiction of the federal courts to enforce the Consent Decrees, rather than as annulling those Decrees. We therefore reverse the court's decision below to the extent that it vacated the Consent Decrees, and note that, while the defendants may be entitled to immediate termination of prospective relief from the *federal* courts, there is nothing to prevent the plaintiffs from seeking the enforcement of the Consent Decrees in *state* courts. We further note that the district court erred in failing to hold an evidentiary hearing to determine whether any prospective federal court relief was warranted under section 3626(b)(3), which provides that prospective relief shall not terminate if the court makes

written findings that the relief "remains necessary to correct a current or ongoing violation of a Federal right" and is narrowly drawn to remedy that violation.

* * *

The plaintiffs in this case and six related cases[1] are pre-trial detainees.[2] They first brought suit in 1975, alleging that conditions in the New York City jails violated their constitutional rights. The original 1978-79 decrees at issue here were formulated to address and remedy those conditions of confinement. These decrees have generated a judicially administered structure comprising over ninety related court orders and extending to more than thirty discrete areas of prison administration. The areas include the handling of detainees' mail and property, cell and body searches, maintenance of the physical plant, food service, and health and sanitary issues. Each decree was approved by the court in which it was pending, and the decrees were consolidated for enforcement before district judge Morris E. Lasker. In 1982, pursuant to the agreement of the parties, a court monitoring agency called the Office of Compliance Consultants ("OCC") was created. The OCC has monitored compliance with the Consent Decrees since that time.

On April 26, 1996, the President signed the PLRA into law. The statute was passed in part to answer the criticism

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[1] The six related cases encompassed within this action are *Forts v. Malcolm*, 76 Civ. 101 (New York City Correctional Institute for Women), *Ambrose v. Malcolm*, 76 Civ. 190 (Bronx House of Detention for Men), *Maldonado v. Ciuros*, 76 Civ. 2854 (Adolescent Reception and Detention Center), *Detainees of the Brooklyn House of Detention for Men v. Malcolm*, 79 Civ. 4913, *Detainees of the Queens House of Detention for Men v. Malcolm*, 79 Civ. 4914, and *Rosenthal v. Malcolm*, 74 Civ. 4854 (Adult Mental Health Center on Rikers Island).

[2] Detainees are men and women awaiting plea or trial, who have not yet been convicted of anything.

that federal courts had overstepped their authority in the context of prison litigation. *Benjamin*, 935 F. Supp. at 340. The Act responded by, *inter alia*, amending 18 U.S.C. § 3626 to establish new standards for the entry and termination of "prospective relief" in civil actions concerning conditions in prisons, jails, and juvenile detention facilities.

Three sections of the PLRA are relevant for our purposes—section 3626(a)(1)(A) (the "prospective relief" provision), section 3626(b) (the "termination" provision), and section 3626(e)(2)(A)(i) (the "automatic stay" provision). Under the prospective relief provision, the district court is not permitted to "grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right [of a particular plaintiff or plaintiffs], and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). Under the termination provision, a defendant or intervener is entitled to "immediate termination of prospective relief" in cases where a court had originally granted such relief without making the findings that are now mandatory under section 3626(a). 18 U.S.C. § 3626(b)(2). Prospective relief may continue, however, if the court "makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3). Finally, the statute contains an automatic stay provision that requires a court—beginning 30 days from the filing of a motion to terminate all prospective relief—to stay such prospective relief pending the court's decision on the underlying motion. 18 U.S.C. § 3626(e)(2)(A)(i).

By an opinion and order entered July 23, 1996, the district court held that the termination provision of the PLRA was constitutional, and vacated the Consent Decrees pursuant to that provision. *See Benjamin*, 935 F. Supp. at 358.[3] Five other courts have upheld the constitutionality of the termination provision. *See Gavin v. Branstad*, 1997 WL 434633 (8th Cir. 1997); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2460 (1997); *James v. Lash*, 965 F. Supp. 1190 (N.D. Ind. 1997); *Jensen v. County of Lake*, 958 F.Supp. 397 (N.D. Ind. 1997); *Inmates of the Suffolk County Jail v. Sheriff of Suffolk County*, 952 F. Supp. 869 (D. Mass. 1997). One court has struck down the termination provision as violating separation of powers principles. *Hadix v. Johnson*, 947 F. Supp. 1100 (E.D. Mich. 1996). Three courts have struck down the automatic stay provision on separation of powers and due process grounds. *Glover v. Johnson*, 957 F. Supp. 110 (E.D. Mich. 1997); *Hadix v. Johnson*, 933 F. Supp. 1362 (W.D. Mich. 1996); *Hadix v. Johnson*, 933 F. Supp. 1360 (E.D. Mich. 1996).

II. DISCUSSION

As an initial matter, we note that the fundamental issue presented in this appeal is the constitutional challenge to the termination provision. Although the plaintiffs ask that we consider the constitutionality of the Act as a whole, we decline that invitation.[4] The termination provision was the only ground on which the defendants

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[3] The district court, however, stayed its ruling to permit the plaintiffs to apply to this court for a stay pending appeal. On August 27, 1996, this court granted that stay.

[4] Accordingly, our references to the prospective relief provision and the automatic stay provision should be understood simply as supplying the context necessary to the interpretation of the termination provision.

moved to vacate the Consent Decrees, and hence is the sole provision we consider on appeal. *See Benjamin*, 935 F. Supp. at 343.[5]

Our inquiry into whether the termination provision is constitutional is complicated by the fact that the provision is ambiguous. It states:

> Immediate termination of prospective relief.—In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least

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[5] It may be argued that section 3626(b)(1)(A)(iii)—which states that "in the case of an order issued on or before the enactment of the PLRA" relief shall be terminable upon a motion filed "2 years after such date of enactment"—bars the defendants from bringing their motion. The Decrees in this case were issued prior to the enactment of the PLRA on April 26, 1996, and the defendants filed their motion to terminate well within two years of that date.

This argument fails because section 3626(b)(2) provides an exception to the rule set forth in section 3626(b)(1)(A)(iii). As noted above, section 3626(b)(2) permits the "immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." We thus believe that a court reviewing relief entered before the enactment of the PLRA, as here, should first determine whether the court granting the original relief made the three findings set forth in 3626(b)(2). If the original court did so, then the defendants could not bring a motion to terminate the relief before April 26, 1998. If the original court failed to make such findings, however, the defendants are, under the statute, entitled to seek "immediate" termination of the prospective relief. Because the original court failed to make such findings in this case, the defendants were not precluded from bringing their motion to terminate relief.

> intrusive means necessary to correct the violation of the Federal right.

18 U.S.C. § 3626(b)(2).

This language can be read in either one of two ways, each of which, if constitutionally valid, would respond to the criticisms that led to the PLRA. The first interpretation would limit the jurisdiction of federal courts so that these courts could not in the future enforce past consent decrees, except insofar as the decrees were found to be tailored to a federal right. The second would render null and void all past federally approved prison consent decrees unless these decrees met the requirement of being narrowly tailored to a federal right. The first reading takes Congress as having focused on the perceived evils that flow from the involvement of federal courts in the minutiae of state prison administration. It therefore interprets the relevant section as putting these courts out of that business, while leaving past agreements, entered into by the parties, in place to be enforced by state courts acting under state law. The second reading, instead, would also get federal courts out of the state prison consent decree business, but through more drastic measures, namely, by annulling the underlying agreements themselves. It would wipe them out despite the fact that the parties had originally—and freely—consented to them, presumably in exchange for some adequate consideration that they received from the other side, consideration that might even have amounted to a waiver of some constitutional rights.

The correct reading of the section turns on the meaning of the words "termination of prospective relief." If "prospective relief" includes the past Decrees themselves, then these are terminated and annulled under the law. If, instead, "termination of prospective relief"

means that no future relief—that is neither future enforcement nor articulation—is available in federal courts under past Decrees, then the Decrees remain valid, but no longer subject to federal jurisdiction.

At a glance, the second interpretation seems plausible. The statute defines "prospective relief" as "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7). It also states that "the term 'relief' means all relief in any form that may be granted or approved by the court, and *includes consent decrees* but does not include private settlement agreements." 18 U.S.C. § 3626(g)(9) (emphasis added). One could, therefore, maintain that "prospective relief" includes the Decrees because (1) "prospective relief" includes all relief except damages, (2) "relief" includes "consent decrees," and (3) consent decrees are not damages.

But, in fact, such a reading has significant linguistic problems. Taken literally, it would imply that the word "relief," without more, includes within it "private settlement agreements." Yet it would be a remarkable twisting of language to describe a contract or an agreement as a form of relief. We simply do not talk that way. The ordinary way of talking and writing is to speak of relief *available under or pursuant to* a private settlement agreement. Since it is clear that private settlement agreements are not a form of relief, why does the definition expressly exclude them? Under the circumstances, it makes more sense to read the definitional phrase as saying "the term 'relief' means all relief in any form that may be granted or approved by the court, and includes [all relief granted pursuant to] consent decrees but does not include [relief granted pursuant to] private settlement agreements." While one can define anything to mean anything, courts should be reluctant to read a def-

initional sentence to mean something that makes another part of the same sentence meaningless or completely superfluous.

Moreover, as no less a jurist than Judge Robert Keeton stated in *Suffolk*—the only case to date that has considered this statutory ambiguity—relief in ordinary legal usage is a type of remedy,[6] *Suffolk*, 952 F. Supp. at 879. As such, it is different from a judgment or a decree—"a 'judgment' or 'decree' consists of more than just a declaration of 'relief,' " and "includes also an adjudication of a breach of some legally recognized duty or violation of some legally protected right." *Id.* at 878. These adjudications "represent judicial determinations regarding the rights and duties of the parties that are distinct from the relief ordered as remedies." *Id.* at 879.[7] It follows

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[6] Black's Law Dictionary defines "relief" as:

> Deliverance from oppression, wrong, or injustice. In this sense it is used as a general designation of the assistance, redress, or benefit which a complainant seeks at the hands of a court, particularly in equity. It may be thus used of such remedies as specific performance, injunction, or the reformation or rescission of a contract.

BLACK'S LAW DICTIONARY 1161 (5th ed. 1979).

[7] In applying this distinction between consent decrees and relief pursuant to consent decrees similar to those in the instant case, the *Suffolk* court noted:

> [A] "consent decree" is still an adjudication of an ongoing obligation based on a claim of "violation of a Federal right" that was at least one part of the subject matter of the civil action in which the Consent Decree was entered. That adjudication may still have pragmatic consequences even after the prospective relief that had earlier been included in the Consent Decree has been terminated. Those consequences might include an entitlement to an award of monetary relief even if specific performance is not available. Also, an adjudication of a past violation of a federal right might still have significant practical consequences in other ways. Not the least of these ways is that officials of other branches of government ordinarily respect and abide by adjudications of a court, even when they question the power or authority of the court to specifically enforce its orders and even while

from *Suffolk*, therefore, as well as from the treatment of private settlement agreements in the definition section, that the statutory definition of relief, which includes consent decrees, should preferably be read to mean that it includes *remedies arising out of or issued pursuant to* consent decrees.[8]

The statute's ambiguity is daunting because its consequences are significant. Under the second interpretation, the termination provision will strip the plaintiffs of all of the protections they negotiated into the Consent Decrees except for those narrowly tailored to federal rights. Under the first interpretation, the provision will simply force the plaintiffs to seek redress for the non-federal aspects of the Decrees in state court as opposed to federal court. These consequences occur, moreover, in a context, prisoner litigation, that is fraught with emotion.

Furthermore, the manner in which we resolve this ambiguity has effects that go far beyond the area of prisoner litigation. Depending on our reading, the statute before us may raise issues of when and how the legislature can affect past judgments in the light of fundamental principles of separation of powers. And it may also require us to consider the power of government to make laws in the face of prior agreements that would seem to limit its ability to do so.

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officially asking the court or a higher court to modify or vacate its adjudications.

Id. at 878.

[8] Interpreting relief to include the Consent Decrees themselves would also render superfluous the statutory definition of "relief" as "all relief in any form." In order for this definition not to be circular, one must read the second "relief" as having legal content independent of the "relief" it defines. The most sensible construction to give to the second "relief" is the ordinary legal one, which is that relief is a type of remedy.

For all these reasons, it is most important that in interpreting this law we be guided by those principles of restraint that, even in simpler questions, are a wise beacon for courts to follow. Among these is that statutes must be construed to avoid constitutional questions whenever such a construction is "fairly possible." *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *see also DeBartolo v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).[9] In considering the plaintiffs' constitutional claims, we must be especially mindful of this canon of statutory construction, and choose the interpretation that more readily permits us to hold the termination provision constitutional.

A. The Termination Provision Is Constitutional

On appeal, the plaintiffs claim that the termination provision violates (1) separation of powers principles; (2) the Equal Protection guarantees of the Fifth and the Fourteenth Amendments; (3) the Due Process Clause of the Fifth and the Fourteenth Amendments.

1. Separation of Powers

While the separation of powers doctrine finds no explicit articulation in the Constitution, it is nevertheless deeply rooted in our constitutional jurisprudence. *See National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337

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[9] As the Supreme Court has stated:

> This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

DeBartolo, 485 U.S. at 575 (citation omitted).

U.S. 582, 590-91 (1949). The object of the doctrine "is basic and vital, namely, to preclude a commingling of the[ ] essentially different powers of government in the same hands." *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933) (citation omitted).

At issue here is the separation of power between the judicial and the legislative branches. Article III of the Constitution assigns to the federal judiciary the power to rule on and decide cases. *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1453 (1995). Preservation of this power "serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (citations and internal quotation marks omitted). Separation of powers is therefore violated when Congress assigns core Article III powers to non-Article III entities. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-58 (1982); *Schor*, 478 U.S. at 850-51.

In maintaining that Congress has arrogated key Article III powers to itself, the plaintiffs make three arguments. First, they claim that the termination provision precludes them from vindicating their constitutional rights. Second, they assert that the provision reopens final decisions of Article III courts. Finally, they contend that the provision prescribes a rule of decision for the courts without permitting an independent exercise of judicial discretion.

a. The Termination Provision Does Not Preclude the Plaintiffs from Vindicating Their Constitutional Rights

In arguing that the termination provision unconstitutionally restricts the remedial power of the federal courts, the plaintiffs point out—correctly—that the termination provision bypasses the usual procedure through which the effects of consent decrees are altered.[10] The defendants respond that this is irrelevant, because nothing precludes Congress from enacting alternative mechanisms through which the effects of consent decrees may be changed, so long as those alternative mechanisms are themselves constitutional. *See Benjamin*, 935 F. Supp. at 344. They further argue that the alternative mechanism the legislature has provided is one that limits the remedial jurisdiction of the federal courts, and that such limitations are constitutional, *see Yakus v. United States*, 321 U.S. 414 (1944); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938), at least so long as they permit litigants ultimately to vindicate federal constitutional rights in federal courts. *See* Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 527 (1974) ("Congress . . . may enact any jurisdictional statute that does not prevent vindication of a constitutional right.").[11]

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[10] For example, in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992), the Supreme Court held that when changed circumstances warrant a modification of a consent decree, the court should not "strive to rewrite a consent decree so that it conforms to the constitutional floor," but only alter the decree "to the extent that equity requires." The Act, in contrast, requires the federal court to limit its relief to that constitutional floor.

[11] In order to decide the constitutionality of the termination provision, it is unnecessary to take sides in the academic debate about whether Congress has the power to eliminate *all* federal jurisdiction in a par-

The plaintiffs counter that their precise problem with the provision is that it reduces the remedial jurisdiction of the federal courts to the point where they cannot get redress for their constitutional rights. It is of course true that section 3626(b) diminishes the power of the federal courts. That diminution, however, does not infringe upon the power that courts must retain in order to meet their obligation of forging adequate remedies. This may best be seen by noting that the Act removes only the discretionary power of the federal courts to afford relief through consent decrees over and above what they could award after a litigated judgment concerning federal rights. This discretionary power flows from the idiosyncratic nature of consent decrees, which generally allow courts to offer more relief than would be permitted after a litigated judgment. *Local Number 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986).[12] While the Act takes away that discretionary power, it guarantees that the court may continue to give prospective relief if it finds on the record that federal constitutional violations exist and that the relief is

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ticular area, as the PLRA does not remove federal jurisdiction over prison conditions litigation insofar as it affects federal constitutional rights. *See generally* Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power To Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132 (1995).

12 Prior to the enactment of the PLRA, a court could enter a consent decree so long as it (1) sprang from and served to resolve a dispute within the court's subject-matter jurisdiction; (2) came within the general scope of the pleadings, and (3) furthered the goals of the law on which the complaint was based. *Local Number 93*, 478 U.S. at 525; *see also Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989). The federal court was thus "not necessarily barred from entering a consent decree merely because the decree provide[d] broader relief than the court could have awarded after a trial. *Local Number 93*, 478 U.S. at 525. This was because, "in addition to the law which forms the basis of the claim, *the parties' consent animates the legal force of a consent decree*." *Id.* (emphasis added).

appropriately tailored to remedy the violation. 18 U.S.C. § 3626(b)(3). The courts will thus still be able to remedy violations of prisoners' constitutional rights as they have traditionally done in litigated cases.

We therefore cannot agree that the termination provision is an unconstitutional incursion on the remedial power of the federal courts. We note, however, that this conclusion is predicated on our interpretation of the termination provision as limiting federal jurisdiction over the non-federal aspects of the Consent Decrees rather than as making those aspects of the Decrees void. That is, it presupposes the first rather than the second reading of the provision; indeed, even the authorities on which the defendants rely all concern attempts to limit jurisdiction, and not attempts to destroy pre-existing judgments or decrees.

b. The Termination Provision Does Not Reopen a Final Judgment of an Article III Court

The plaintiffs next maintain that the termination provision reopens a final judgment of an Article III court in violation of *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995). In that case, the Supreme Court considered a law that resurrected previously dismissed cases under section 10(b) of the Securities Exchange Act of 1934 by imposing less strict limitations on such claims. The Court found that the law was unconstitutional because separation of powers principles forbad the legislative reopening of final judgments. *Id.* at 1463. In so holding, it underscored the strict nature of the doctrine, noting that separation of powers is a "*structural safeguard*" which establishes "high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Id.*

The plaintiffs assert that because the termination provision calls for the modification of the Consent Decrees, the provision will be unconstitutional if consent decrees are final judgments. This is incorrect. Even assuming that the Decrees are final judgments,[13] the termination provision does not necessarily violate *Plaut*, because *Plaut*'s seemingly categorical language about "high walls and clear distinctions" was nevertheless not absolute. 115 S. Ct. at 1463.

Indeed, the *Plaut* Court itself expressly recognized a number of cases that "distinguish themselves" from its decision, and which thereby created exceptions to the rule that Congress cannot alter any aspect of a final judgment. *Id.* at 1459. The most relevant of these cases is *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), in which Congress was permitted to alter through legislation the prospective effects of an injunction entered by a final judgment of the Supreme Court. The injunction had mandated that a privately owned bridge across the Ohio River either be removed or raised because it was a public nuisance obstructing the free navigation of the river. *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 626 (1852). Subsequent legislation, however, made the bridge a post-road and required that navigation not interfere with the bridge. After the bridge was destroyed in a storm, Pennsylvania sought to enjoin its

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[13] The plaintiffs correctly note that the Supreme Court has stated as a general matter that a consent decree is a final judgment. *Rufo*, 502 U.S. at 391. The plaintiffs acknowledge, however, that this is not necessarily dispositive, given that finality may be defined differently for different purposes. *See Western Union Tel. Co. v. International Bhd. of Elec. Workers*, 133 F.2d 955, 957 (7th Cir. 1943) ("[T]hough a decree may be final as it relates to an appeal and all matters included or embodies [sic] in such a step, yet, where the proceedings are of a continuing nature, it is not final.").

reconstruction, but the Court dissolved the injunction based on the new statute. In so doing, the *Wheeling Bridge* Court emphasized the nature of the relief awarded, distinguishing an action for damages from an equitable decree. It noted that if the original remedy had been damages in favor the plaintiff, the right to those damages (like the costs actually awarded in that case) "would have passed beyond the reach of the power of congress," but that because the injunctive remedy was "executory, a continuing decree" it could be modified by subsequent legislation. *Wheeling Bridge*, 59 U.S. at 431.

In distinguishing *Wheeling Bridge*, the *Plaut* Court implicitly drew a similar distinction between two kinds of final judgments for separation of powers purposes—final judgments without prospective effects, which could not be constitutionally revised through legislation, and final judgments with prospective effects, whose *effects* could constitutionally be so revised. *Plaut*, 115 S. Ct. at 1459; *see also Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 818 (D.C. Cir. 1974) (holding that vulnerability to legislative alteration "would seem to depend on the character of the compliance called for"). In other words, the *Plaut* rule that legislation generally cannot touch final judgments may thus contain a *Wheeling Bridge* exception for legislation "alter[ing] the prospective effect of injunctions entered by Article III courts." *Plaut*, 115 S. Ct. at 1459.

As the plaintiffs acknowledge, the Consent Decrees in this case provide for prospective relief that is subject to the continuing supervisory jurisdiction of the district court.[14] In this way, the effects of the Decrees are not

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[14] The text of the PLRA seemingly seeks to place the relevant provision within the *Wheeling Bridge* exception. For the PLRA differentiates between damages and other kinds of relief, defining the "prospective

dissimilar to the effects of a final judgment enjoining future acts.[15] The Consent Decrees would therefore appear to fall within the possible *Wheeling Bridge* exception to the separation of powers principle articulated in *Plaut*.

Not to be deterred, the plaintiffs maintain that the *Wheeling Bridge* exception is unavailable to the defendants for a different reason. They argue that the crucial distinction in *Wheeling Bridge* was one between public and private rights, and that the legislature is free to alter judgments involving public rights but not—as in the case before us—private ones. And it is true that some courts, including the Supreme Court, have interpreted *Wheeling Bridge* as making this distinction, *see, e.g.*, *Hodges v. Snyder*, 261 U.S. 600, 603-04 (1923); *Johnston v. Cigna Corp.*, 14 F.3d 486, 492 (10th Cir. 1993); *Daylo*, 501 F.2d at 818.

Insofar as the public/private distinction actually guides the separation of powers analysis, we note that the distinction must serve as an additional constitutional barrier, rather than as one that replaces the one made between retrospective and prospective relief. For if *Wheeling Bridge* had been decided on the difference between private and public rights alone, the costs awarded by the original *Wheeling Bridge* Court no less

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relief" that may be terminated under the Act as "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7).

[15] In *System Fed'n No. 91 v. Wright*, 364 U.S. 642 (1961), the district court had entered a consent decree enjoining a union from requiring railroad employees to join it based on then-prevailing law. After the underlying law changed, the plaintiff moved the court to modify the decree, but the court refused. The Supreme Court reversed, holding that the fact that the judgment arose from a consent decree as opposed to a litigated decree did not absolve the lower court of the obligation to modify the decree. *Id.* at 650-51.

than the injunction would have been vulnerable to legislative action, because both related to public rights. The fact that the *Wheeling Bridge* Court found that the previously awarded costs were beyond the reach of the legislature, while the injunction was not, indicates that another distinction—namely the one between retrospective and prospective relief—was also at play. Thus the plaintiffs' argument, properly understood, is that the prospective/retrospective distinction and the public/private distinction each provide potential constitutional obstacles to legislation that seeks to affect a final judgment. In other words, they contend that even legislation that alters an executory judgment will be unconstitutional if it relates to a "private right."[16]

This is certainly a plausible argument. Nonetheless, it fails, at least if we read the statute as barring only prospective relief in federal courts, rather than as nullifying the Decrees themselves.

We note first that the cases that emphasize the public/private distinction are of no more than persuasive authority in dealing with separation of powers claims, since the sole case that binds this court, *Hodges*, made the public/private distinction in considering a due process rather than a separation of powers claim. But even assuming that we were to adopt the requirement that—under separation of powers principles—executory judgments must concern a public right in order to be susceptible to legislative revision, that would still not render the termination provision unconstitutional under the first interpretation that can be given to that provi-

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[16] Because the Court in *Plaut* found that the statute modifying the judgment was void on the ground that the judgment was not executory, it did not need to reach the question of whether the rights at stake were public or private.

sion. This is because the defendants convincingly argue that the right in question in this case relates not to the private rights of the detainees, which the statute was careful to preserve, but to the right to have non-federal claims vindicated in a federal forum. As noted above, the latter is a question of federal jurisdiction, which is clearly within Congress's plenary power to determine. Thus, even if we accept the plaintiffs' graft of a "public right" requirement as limiting the circumstances in which an executory judgment can be legislatively altered, the termination provision survives. For the provision does not require the nullification of a judgment that gave the plaintiffs a private right. It can be read, rather, as a change of a public law altering the forum in which that private right must be vindicated.

The distinction between altering the prospective effects of judgments and altering the judgments themselves, like the distinction between public and private rights, is not purely a formal one. These distinctions are another way of expressing the notion discussed in part II(A)(1)(c) *infra*, that the legislature, while it cannot undo past decisions of courts, may not be prevented from legislating within its powers for the future benefit of its citizens. In this respect, neither judgments, nor consent decrees, nor contracts—even those to which the government is a party—can take away its sovereign duty to govern. *See generally United States v. Winstar Corp.*, 116 S. Ct. 2432, 2463 - 66 (1996) (Souter, *J.*, concurring.); Guido Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 YALE L.J. 1191, 1197-1202 (1962).

We conclude therefore that the termination provision does not violate *Plaut*. We again note, however, that this finding depends on our interpretation of the termination

provision as doing no more than limiting the remedial jurisdiction of the federal courts. As the Supreme Court noted, the *Wheeling Bridge* exception allows the "alter[ing of] the prospective effect of injunctions entered by Article III courts," *Plaut*, 115 S. Ct. at 1459. It does not permit the alteration of the adjudication from which those effects arose. It follows that the availability of the exception, and hence the uncomplicated constitutional validity of the termination provision, depends on the assumption that the provision does not attempt to disturb the underlying Consent Decrees, but only precludes their future articulation and enforcement *in federal courts*.

c. The Termination Provision Does Not Prescribe A Rule of Decision, But Rather Changes the Underlying Law

Finally, the plaintiffs maintain that the termination provision violates *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), which held that the separation of powers doctrine is violated when Congress prescribes a rule of decision for courts to follow without permitting courts to exercise their judicial powers independently. The defendants counter that Congress did not attempt to prescribe such a decision through the PLRA, but merely changed the law underlying the prospective effects of an executory judgment, which they again contend is permissible under *Wheeling Bridge*. We must therefore determine whether the PLRA is more properly analyzed under a *Klein* or a *Wheeling Bridge* paradigm.

It is useful to lay out the difference between the two cases. The plaintiff in *Klein* was the administrator of V.F. Wilson, a Confederate sympathizer. The administrator sought to recover the proceeds of the sale of Wil-

son's cotton, which had been confiscated by the United States Treasury during the Civil War. He brought suit under a statute that permitted the recovery of such proceeds by noncombatant confederate landowners upon proof of loyalty to the federal government. The Court of Claims ruled in his favor because Wilson had received a pardon, and the Supreme Court in an earlier case had determined that the receipt of a Presidential pardon was sufficient proof of loyalty under the recovery statute. While *Klein* was being appealed to the Supreme Court, Congress passed a statute that stated that such presidential pardons were evidence of *dis*loyalty. The statute further directed the Supreme Court to dismiss any case in which a claimant had prevailed in the Court of Claims through a showing of proof of loyalty based on a Presidential pardon. The Supreme Court struck down the new statute. It held that Congress could not force courts to discount the legal or evidentiary effect of a presidential pardon and impose a rule of decision on a court in a pending case. The Court stated that when Congress "prescribe[d] a rule for the decision for a cause in a particular way," it "passed the limit which separates the legislative from the judicial power." *Id.* at 146-47.

In reaching its holding, however, the *Klein* Court also distinguished *Wheeling Bridge*. The Court noted that in *Wheeling Bridge*, Congress had not prescribed a different decision under the same law, but had altered the law and had left the court "to apply its ordinary rules to the new circumstances created by the act." *Klein*, 80 U.S. at 146-47. In other words, when it declared the previously privately owned bridge to be part of a post-road, Congress had not required the dissolution of the preexisting injunction. It had simply altered the underlying legal relationships and hence had presented a new situ-

ation for the courts to interpret. Specifically, the question before the *Wheeling Bridge* Court was not whether the old injunction had been vacated, but whether any injunction was proper when the alleged nuisance was a government entity—as under the altered law it was. The Court in *Wheeling Bridge*, *Klein* implies, did no more than apply the then ordinary rule of law that a governmental entity could not be enjoined as a nuisance.

It follows that, if legislation can be characterized as changing the underlying law rather than as prescribing a different outcome under the pre-existing law, it will not violate the separation of powers principle formulated in *Klein*. This distinction between *Klein* and *Wheeling Bridge* has been acknowledged in subsequent cases. *See, e.g., Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993) ("The rule of *Klein* precludes Congress from usurping the adjudicative function assigned to the federal courts under Article III. However, *Klein* does not preclude Congress from changing the law applicable to pending cases.").

The distinction may in some cases be hard to discern. Whether a statute provides only the standard to which courts must adhere or compels the result that they must reach can be a vexed question in cases in which, as a practical matter, simple adherence to the "new" standard in effect mandates a particular result. Such cases may be plausibly characterized either as validly leading the court to reach a different outcome as a result of a change in the underlying law or as unconstitutionally imposing a different outcome under the previous law. *Compare Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992) (upholding a statute as a constitutionally permissible change in law under *Wheeling Bridge*), *with Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311 (9th

Cir. 1990) (previously striking down the same statute as prescribing rule of decision in violation of *Klein*).

This case suffers from no such ambiguity. The termination provision requires the federal courts to determine whether or not there has been a violation of a federal right. And, unlike the *Klein* statute, the termination provision does not prevent courts from exercising jurisdiction over those cases that involve violations of such federal rights. Furthermore, as the defendants argue, it alters no pre-existing judgments. It only ensures that federal claims under those judgments are heard in federal court and state claims are heard in state court. The provision, it is thus argued, should be read as doing no more than changing the remedial jurisdiction of the federal courts, and not as a means to the improper end of vacating the Consent Decrees. In so doing, it merely makes "changes in law, not findings or results under old law." *Seattle Audubon*, 503 U.S. at 438.

Once again, however, it must be understood that the interpretation of the PLRA that avoids a serious *Klein* problem is the first, because it does not annul the underlying Decrees, but, instead, only changes the forum in which they can be enforced.

2. Equal Protection

The plaintiffs also contend that the termination provision violates the Equal Protection guarantees of the Fifth and Fourteenth Amendments. The threshold question for such claims is the appropriate level of scrutiny to be applied. The plaintiffs assert that the court should subject the termination provision to heightened scrutiny, which is appropriate where the statute in question uses a classification that is for historical reasons "constitutionally suspect," *McLaughlin v. Florida*, 379 U.S. 184,

192 (1964), or where it burdens a fundamental right, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966). We reject this contention. The plaintiffs conceded below that pre-trial detainees are not a suspect class. *Benjamin*, 935 F. Supp. at 352. Moreover, the plaintiffs' claim that the PLRA burdens the fundamental right of access to the courts lacks merit. That right of access "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); *see also Lewis v. Casey*, 116 S. Ct. 2174, 2181 (1996). Because, however, the termination provision permits prisoners to establish violations of their federal constitutional rights in federal courts, it does not burden this initial right of access to the courts. This is especially so since any fundamental rights arising in non-federal ways can still be vindicated in state courts. It follows that the plaintiffs are not entitled to heightened scrutiny, but only to a review for "rationality." Under this standard, statutes are traditionally granted a strong presumption of constitutionality if a rational relationship exists between the disparate treatment and a legitimate governmental purpose. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Moreover, it is not required that Congress specifically articulate its rationale on the record. *Id.* at 320. Here, at least one government purpose was to avoid the entanglement of federal courts in prison litigation beyond the minimum necessary to vindicate federal rights. This objective is clearly legitimate. *See Lockerty*, 319 U.S. at 187. The challenged provision, insofar as it limits the jurisdiction of the federal courts to claims founded on an actual violation of a federal right, is also a rational means to this end. We need, therefore, look no further for possible legitimate legislative goals, and find that the

termination provision survives rational review as traditionally exercised.

In the alternative, the plaintiffs contend that the termination provision does not survive rational review as applied in *Romer v. Evans*, 116 S. Ct. 1620 (1996). They contend that the PLRA, like the state constitutional amendment at issue in *Romer*, makes prisoners "strangers to [the] laws." *Id.* at 1629. But as the district court pointed out, *Romer*'s Amendment 2 can be easily distinguished from the termination provision challenged here. *Benjamin*, 935 F. Supp. at 353-54. Unlike the termination provision, Amendment 2 barred all three branches of government from protecting gays, lesbians, and bisexuals, and imposed a complete prohibition on the enforcement of their rights. *Romer*, 116 S. Ct. at 1625. In contrast, the termination provision only limits the authority of the federal judiciary. The plaintiffs cannot assert that they are entirely shut out of the political process, or even from judicial protection in state courts. Their claim is that one branch of the federal government is trying to strip away protections accorded to them by limiting their access to another federal branch. Framed in this way, it becomes clear that the alleged violation is more properly cast as an infringement of the separation of powers rather than one of "equal protection of the laws in the most literal sense." *Id.* at 1628.

The termination provision does not violate the Equal Protection guarantees of the Fifth and the Fourteenth Amendments.

3. Due Process

The plaintiffs finally assert that the termination provision violates the Due Process Clause of the Fifth and the Fourteenth Amendments. They contend that the Con-

sent Decrees are vested rights that Congress cannot alter by legislation without violating due process and that the application of the PLRA to the Consent Decrees would unconstitutionally impair their contracts with the defendants, also in violation of their due process rights.

The defendants counter the impairment of contracts claim by asserting that the Consent Decrees are not contracts for due process purposes. That is a dubious proposition. *See Local Number 93*, 478 U.S. at 525 ("the parties' consent animates the legal force of a consent decree"). But it is one we need not resolve today, for even assuming the Consent Decrees to be contracts for this purpose, the termination provision does not offend due process.

Where the federal government is a party to a contract, a statute modifying the contract will be subjected to the "sovereign acts" doctrine, under which Congress may abrogate contracts through general legislation, but may not target a class of contracts to which it is a party. *See Resolution Trust Corp. v. Federal Sav. & Loan Ins. Corp.*, 25 F.3d 1493, 1501 (10th Cir. 1994). Heightened scrutiny is required when such targeting occurs because of the danger of self-dealing. *Id.*; *see also Winstar*, 116 S. Ct. at 2466 (Souter, *J.*, plurality opinion) ("The greater the Government's self-interest, . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence . . . ."); Guido Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 YALE L.J. 1191, 1203 (1962). But in this case, the Consent Decrees are contracts between a state entity and a private party. And the plaintiffs have not adequately supported their proposition that there is a significant danger of federal self-dealing here analogous,

say, to that in *Resolution Trust*. Under the circumstances, the Act's modifications to the Consent Decrees are only subjected to the lower level of scrutiny given to governmental alterations of private contracts. *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 472 (1985). Especially if the PLRA is read as not destroying the plaintiffs' contracts, but only as requiring plaintiffs to enforce the contracts in a different forum, the provision before us easily survives this scrutiny.

The plaintiffs' assertion that, even apart from impairment of contracts, the Consent Decrees have given them vested property rights that Congress may not constitutionally alter fares no better. The so-called "vested rights" doctrine is the due process analog of the separation of powers doctrines discussed in *Plaut*. *See Plyler*, 100 F.3d at 374; *Axel Johnson, Inc.*, 6 F.3d at 83-84. It is well-settled that a final money judgment creates a "vested right" and hence a constitutionally protected property interest. *See McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898). But whatever interest the plaintiffs may have in the Consent Decrees themselves, they do not have a vested right in the *prospective federal court enforcement* of those Decrees. *Cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (noting that because "relief by injunction operates *in futuro*," a party has no "vested right.").

The plaintiffs' due process claims are without merit.

B. The District Court Erred in Vacating the Consent Decrees

Because the termination provision does not violate separation of powers principles, equal protection, or due process, we affirm the district court's finding that the

termination provision survives the constitutional challenges brought by the plaintiffs. Our analysis in reaching that holding largely tracks that of the other courts that have declared the termination provision constitutional. *Cf., e.g., Gavin*, 1997 WL 434633; *Plyler*, 100 F.3d at 370-75; *Benjamin*, 935 F. Supp. at 344-57; *Suffolk*, 952 F.Supp. at 875-83. Our agreement with two of those decisions—*Plyler* and the determination of the court below—however, ends there. These two decisions followed their holdings that the termination provision was constitutional with vacaturs of the consent decrees.[17] But like the *Suffolk* court, we believe, instead, that this is by no means the consequence of upholding the constitutionality of the termination provision. To the contrary, we find that the provision's constitutionality is only comfortably preserved by assuming that, while the PLRA limits the jurisdiction of the federal courts to enforce consent decrees, it does not destroy the underlying agreements themselves.

The conclusion that section 3626(b) survives the plaintiff's constitutional challenges means that the provision's language permitting the termination of "prospective relief" must be given effect. 18 U.S.C. § 3626(b). But the further step of annulling the Consent Decrees can be justified only if the phrase "termination of prospective relief" also entails the vacatur of such judgments and decrees. We recognized at the outset that the statute was ambiguous as to whether it did or not, and we stated that we would look to the constitutional analysis to help us resolve the ambiguity.

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[17] The Eighth Circuit did not vacate the consent decrees in *Gavin*, but remanded the case to the district court for further proceedings to determine whether immediate termination was in fact warranted under section 3626(b). *See Gavin*, 1997 WL 434633 at *10. The *Gavin* court did not discuss the possibility of continued enforcement of the decrees in state court.

That analysis has clarified the ambiguity with a vengeance. Our success in dismissing *each* of the three separation of powers challenges to the termination provision was predicated on the argument that the termination provision only sought to limit the jurisdiction of the federal courts.[18] We answered the argument that the provision unconstitutionally deprived the plaintiffs of adequate remedies by relying upon *Yakus*, *Lockerty* and *Lauf*, which stand for the proposition that Congress can constitutionally limit the remedial jurisdiction of the courts. Similarly, the availability of the *Wheeling Bridge* exception, which allowed the provision to survive a *Plaut* challenge, depended on our characterization of the termination provision as altering the *effects* of the Consent Decrees rather than the Decrees themselves. Finally, we met the plaintiffs' *Klein* challenge, that the termination provision prescribed a rule of decision, by noting that the provision constitutionally changed the underlying law *relating to jurisdiction* rather than mandating the dissolution of the Decrees. In short, whenever the constitutionality of the termination provision was seriously questioned by the plaintiffs, our "saving interpretation" was dependent on the premise that the Act merely limited federal jurisdiction rather than destroyed the underlying Decrees.[19]

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[18] We note that this construction of the termination provision also helped insulate the statute from the plaintiffs' Equal Protection and Due Process challenges. It is not for us to determine today whether the provision would survive these, or the separation of powers objections, under the second interpretation of the clause. The fact that one plausible reading escapes serious constitutional difficulties, while another runs headlong into them, is enough to justify the first construction, precisely because it allows courts to avoid making unnecessary constitutional pronouncements.

[19] In this respect we are not alone. It is interesting to note that the defendants in their argument from time to time assert that what the statute does is limit federal jurisdiction rather than annul judgments. I do not

In so doing, we concluded that even though the statute could also be read as making "termination of prospective relief" include the termination of consent decrees, 18 U.S.C. § 3626(g)(7), it nevertheless did not, and should not, be construed as destroying the real distinction between the terms "relief" and "decree." As Judge Keeton noted in *Suffolk*:

> Lawmaking cannot erase the reality of this distinction [between "relief" on the one hand and a "judgment" or "decree" on the other]. The most that lawmaking can do is to declare the distinction immaterial to outcome in a particular context. And if a statute is interpreted as declaring this distinction immaterial to whether a previously entered consent decree is to be vacated, a serious issue of constitutionality is presented.

952 F. Supp. at 878. Thus, while a statute may blur the terms "relief" and "decree" as a matter of semantics, it may not do so as a matter of substance. One enduring substantive distinction is that legislative termination of relief is constitutional, while legislative termination of a decree is dubious at best. And no amount of calling a decree "relief" can quell the constitutional concerns attendant to Congressional revision of a decree. Fleming James—like Judge Keeton a great torts scholar—was fond of saying: "You can call it Thucydides or you can call it Mustard Plaster, but it's all proximate cause just the same." And so it is here; whatever one calls it, the underlying essence—rose or nightshade—is unaltered.

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mean to imply that they accept our "saving interpretation." They almost surely do not since they ask that the Decrees be vacated. I only suggest that, when the consitutional going gets rough, the defendants themselves, probably inadvertantly but nonetheless significantly, employ descriptions of the Act's effects that are only consistent with the first and less draconic reading of the statute.

We cannot, of course, read statutes against their clear meaning, even to save them. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress."). But where, as here, two plausible readings are presented, we are bound to accept the reading that avoids constitutional doubts. Indeed, this would be so even if the plainly constitutional construction were less plausible than the one we have before us, which, in fact, by the meaning it gives statutory terms like "relief," "remedy," and "private settlement agreements," is far more consistent with ordinary usage than is the interpretation that creates grave constitutional problems.

We therefore read the statute's "termination of prospective relief" as referring to the constitutional termination of the federal remedies arising out of the Decrees rather than as mandating the termination of the Decrees themselves.[20] Accordingly, the vacatur of the

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[20] The duty to construe statutes to avoid constitutional problems does not require us to interpret a statute in a manner manifestly contrary to congressional intent. *See DeBartolo*, 485 U.S. at 575. In this case, however, the legislative history also supports the theory that Congress was attempting to change the jurisdiction of the federal courts rather than to annul the judgments of those courts. The emphasis of that history is not on precluding the prisoners from obtaining relief, but on foreclosing the federal courts from granting relief based on non-federal claims. *See, e.g.*, 141 Cong. Rec. H14078, H14105, H14106 (daily ed. Dec. 6, 1995) (statement of Rep. Canady) ("For too long the Federal courts have been attempting to micromanage correctional facilities throughout the country."); 141 Cong. Rec. S14408, S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) ("It is past time to slam shut the revolving door on the prison gate and to put the key safely out of reach of overzealous Federal courts."); 141 Cong. Rec. S14611, S14626 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) ("[The PLRA] will work to restrain liberal Federal judges . . . who have used [prisoner] complaints to micromanage State and local prison systems.").

Consent Decrees is precluded not in spite of, but because of, the constitutionality of the termination provision.

C. Consequences for This Case

What does all this mean for the case before us? No more and no less than that the non-federal aspects of the Consent Decrees are hereafter not to be enforced by the federal courts. The underlying contract, in its time made into a judgment, is left untouched, but federal courts no longer have the jurisdiction to enforce it. Since that contract/judgment, like any judgment of a court, cannot be affected directly by Congresss, we have not read Congress as having attempted to do so. It follows that the Consent Decrees remain binding on the parties, although the jurisdiction available to them to enforce these binding agreements has been changed. And the parties are no more free to ignore the agreements they have made than they are to ignore any other agreement as to which no redress in federal courts is available.[21]

The plaintiffs, therefore, should be able to get all the relief from state courts, including specific performance, that had previously been available to them federally under the Consent Decrees. Indeed, section 3626(d) of the Act explicitly states that "[t]he limitations on remedies in this section shall not apply to relief entered by a

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[21] The *Suffolk* court suggested that breaches of consent decrees like these might give rise to monetary relief in the federal courts even though specific performance is no longer available in those courts. *Suffolk*, 952 F. Supp. at 878. And it is true that the PLRA excludes "compensatory monetary damages" from its definition of the terminated "prospective relief." 18 U.S.C. § 3626(g)(7). But damages would only arise (for breaches of the Decrees before us) if state courts were to fail properly to enforce the Decrees. Since we have no reason to assume that states would not hold the parties to their contractual duties, we express no view as to the availability of federal damages in the event of a breach, followed by a state enforcement failure.

State court based solely upon claims arising under State law." Since we have held that "relief" includes the remedies that arise under the Consent Decrees, we read this provision to say that state courts may enter relief arising out of any contract or consent decree, including federal consent decrees. This is because federal consent decrees are not only federal court judgments but also, and separately, contracts arising under state law.[22]

To the extent that the states do *not* enforce the contractual rights embodied in the Decrees, they might unconstitutionally impair the parties' contractual rights. In such an event, it is not impossible that federal rights would arise, just as they might if states refused retroactively to enforce any other previously valid contract.[23] If,

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[22] Consent decrees are a hybrid of a judgment and a contract. It is therefore not surprising that whether consent decrees should be construed primarily as contracts or as judgments is a matter of heated debate. *Compare United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) (consent decree is "to be construed for enforcement purposes basically as a contract), *with United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932) (rejecting argument that a consent decree "is to be treated as a contract and not as a judicial act"). We are not, however, called upon to resolve this dispute. All that is needed for the issues before us is what the Supreme Court has recently stated in *Local Number 93*, 478 U.S. at 525, namely that "in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree." In other words, the same thing that typically makes contracts valid under state law is present as the animating force in consent decrees.

Significantly, section 3626(d) does not restrict the right of state courts to enter relief to those situations in which the claim arises *solely* "under state law," *i.e.*, when there is no federal component to the claims. Rather, it preserves that right whenever the state court bases its relief "solely upon claims arising under state law," *i.e.*, when state courts ground the relief they grant on state contract principles alone.

[23] In this respect, we note that at the time the Consent Decrees were entered into, each of the parties gave good and valuable consideration in exchange for what it received. Thus the detainees gave up their right to what could well have been immediate redress of constitutional violations, while the state conceded benefits that were perhaps not constitutionally mandated to gain time to make changes in its prison structure.

moreover, states were to discriminate against these pre-existing contractual rights, because they arose as a result of previous federal court involvement, the claim that a federal right had been violated would be that much stronger.[24] But we have no reason to expect any such behavior on the part of state courts, and therefore need say no more on these issues unless and until they arise in an actual case.

In addition, we note that termination of prospective federal court relief is not automatic under the PLRA. Section 3626(b)(3) provides that:

> Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

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[24] This would be so because states cannot constitutionally discriminate against otherwise valid claims brought in state courts due to federal interest in those claims. *Cf. Howlett v. Rose*, 496 U.S. 356 (1990) (holding that state courts' refusal to entertain § 1983 claim against school district when state courts entertained similar state-law actions agasint state defendants violated Supremacy Clause). And Congress cannot constitutionally invite such discrimination.

> Obviously, exile to the state courts is not ordinarily a cause for due process complaint. But where Congress has acted in a way that exposes constitutional claimants to a high risk of state court prejudice—especially if it has done so intentionally—matters change. The constitutional litigant, entitled to review of his or her claims by a court capable of dealing fairly and independently with them, is offered instead a state judiciary that Congress is actively seducing to malfeasance.

Lawrence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 79-80 (1981).

In determining whether further prospective federal court relief was warranted under section 3626(b)(3), the district court felt constrained to consider only the facts already in the record. *See Benjamin*, 935 F. Supp. at 357 - 58. Since the existing record was silent as to whether there were current or ongoing violations of federal rights, the court vacated the Decrees in their entirety. *See id.*

We, however, agree with the position taken by the United States, an intervenor in this action, that the " 'record' is not necessarily limited to the record that existed prior to the filing of a motion to terminate under section 3626(b). Rather, where the court determines that additional evidence is necessary for it to decide whether to terminate [federal] relief, the record may include supplemental information that is presented to the court." Given that the pre-existing record will rarely contain information on the "current" state of affairs, this construction of section 3626(b)(3) is the most sensible one. Indeed, the district court's contrary interpretation of the term "record" would render the section a virtual nullity. The district court's reading is, moreover, inconsistent with the approach taken by other courts, which in applying section 3626(b)(3) have allowed the record to be supplemented with information on current conditions. *See, e.g., Gavin*, 1997 WL 434633 at *11 (remanding case to district court for determination of, *inter alia*, whether there are ongoing violations of federal rights); *Jensen*, 958 F. Supp. at 406-07 (declining to terminate decree until after holding a hearing to determine whether ongoing constitutional violations exist); *Carty v. Farrelly*, 957 F. Supp. 727, 733 (D. V.I. 1997) (relying on testimony, documents, and photographs introduced at an evidentiary hearing on defendants' motion to modify or terminate consent decrees under PLRA).

We are aware, however, that "[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Hence, it may be that the plaintiffs would prefer to seek enforcement of the Decrees in their entirety in state court rather than pursuing what might in the end give rise to partial federal court relief under section 3626(b)(3) and partial state court relief based on local contract law principles. But the choice is up to them, and should they choose to remain in federal court, we hold that they are entitled to an evidentiary hearing on their allegations of current and ongoing violations of federal rights.

One further question remains to be addressed. On August 27, 1996, this court issued a stay which has kept the federal courts in the business of enforcing these Consent Decrees pending the resolution of this appeal. While we have today held that federal courts have been constitutionally deprived of jurisdiction over these Decrees by the PLRA (at least to the extent that the Decrees are not narrowly tailored to remedy ongoing violations of federal rights), we nonetheless, for the moment, decline to lift that stay. The issue before us has divided the courts that have heard it. Any abandonment of supervision by the federal courts would be extremely disruptive should the Supreme Court grant certiorari and subsequently hold that the relevant sections of the PLRA are invalid. Therefore, and for essentially the same reasons that prompted this court to stay the district court's judgment pending this appeal, it is appropriate for the stay to remain in effect until the Supreme Court has acted on any possible petition for certiorari. We are not unmindful that if our holding is left in place, the plaintffs may

well go to the New York courts and ask them to take over the enforcement of these agreements. In order to facilitate this, should either party wish to speed the transfer to state jurisdiction, we modify the stay expressly to permit the parties to invoke state jurisdiction over the agreements now, to take immediate effect at such time as the time for filing a petition for certiorari has lapsed, or such a petition has been denied, or this Court, or the Supreme Court, has lifted the above mentioned stay. Nothing in the above forecloses continued federal jurisdiction should the district court on remand find that the Decrees are narrowly tailored to remedy current or ongoing violations of federal rights

* * *

The judgment of the court below is AFFIRMED insofar as it upheld the constitutionality of the termination provision of the PLRA, and is REVERSED insofar as it vacated the Consent Decrees. The stay issued by this court is modified, but remains in effect.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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75 Civ. 3073 (HB)
Date Filed: _____

JAMES BENJAMIN, et al.,

Plaintiffs,

—against—

MICHAEL P. JACOBSON, et al.,

Defendants
and related cases.

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OPINION AND ORDER

HAROLD BAER, Jr., District Judge:

Defendants have moved for immediate termination of the Consent Decrees and all supplemental orders entered in this action and the six related cases that are encompassed herein[1]

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[1] The six related cases are: *Forts v. Malcolm*, 76 Civ. 101 (New York City Correctional Institute for Women), *Ambrose v. Malcolm*, 76 Civ. 190 (Bronx House of Detention for Men), *Maldonado v. Ciuros*, 76 Civ. 2854 (Adolescent Reception and Detention Center), *Detainees of the Brooklyn House of Detention for Men v. Malcolm*, 79 Civ. 4913, *Detainees of the Queens House of Detention for Men v. Malcolm*, 79 Civ. 4914, *Rosenthal v. Malcolm*, 74 Civ. 4854 (Adult Mental Health Center on Rikers Island). *See* Declaration of Michael P. Jacobson dated June 28,

based on the recently enacted Prison Litigation Reform Act of 1995 ("PLRA" or "the Act"), Pub.L. No. 104-134, 110 Stat. 1321, §§ 801-810 (Apr. 26, 1996). Plaintiffs oppose the motion on the basis that the Act is superseded by the Federal Rules of Civil Procedure and is unconstitutional.[2] Although the Court's concerns with this new legislation are myriad, I am constrained under the law to uphold it. As the Supreme Court reminds us in the course of upholding the constitutionality of a Social Security eligibility provision:

> [I]t is not within our authority to determine whether the congressional judgment expressed in that Section is sound or equitable, or whether it comports well or ill with purposes of the Act. . . . The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom.

Flemming v. Nestor, 363 U.S. 603, 611 (1960). Accordingly, the defendants' motion is granted and the Consent Decrees are vacated.

BACKGROUND

The Consent Decrees in these related cases were entered in 1978-1979. As drafted and agreed to by the parties, and proposed to the Court for its approval, these decrees aimed to ensure that prison conditions became and remained safe and humane. The Decrees address issues that affect individual detainees directly as well as more structural, institutional problems that arise in prison management. Detainees, it should be noted, are those men and women awaiting plea or trial. They have not yet been convicted of anything.

1996 at 2 n. 1. The Court will refer to all of the consent decrees and supplemental orders as the "Consent Decrees."

[2] Pursuant to 28 U.S.C. § 2403(a), the Court certified to the United States Attorney General that the constitutionality of the PLRA had been drawn into question in this case and invited the United States to intervene. The United States intervened and submitted a brief in support of the constitutionality of the Act.

A few brief examples of the most important provisions of the Consent Decrees may be helpful. On the individual level, the Consent Decrees ensure that detainee mail and property are handled properly, and that procedures in concert with constitutional protections are followed during detainee cell and body searches. On an institutional level, the Consent Decrees seek to maintain the physical plant of the jails in a condition safe for human habitation. They mandate that attention be given to vermin and insect control, sanitation, maintenance and refuse removal. Other provisions govern food services to the detainees and ensure that the detainees are adequately fed while in custody, with food that is prepared and served in a sanitary environment.

The PLRA, which was passed and signed as part of an appropriations bill, deals primarily with prisoners' rights and prison conditions litigation. This decision represents one of the first tests with respect to the constitutionality of the Act. Section 802 of the PLRA amends 18 U.S.C. §§ 3626(a)(1), 3626(b)(2) and (3) and 3626(e) as follows:

> (a) Requirements for Relief.—
>
> (1) Prospective relief.—(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.
>
> * * *
>
> (b) Termination of Relief.—
>
> * * *

(2) Immediate termination of prospective relief.—In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation.—Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

* * *

(e) Procedure for Motions Affecting Prospective Relief.—

(1) Generally.—The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions.

(2) Automatic stay.—Any prospective relief subject to a pending motion shall be automatically stayed during the period—

(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

(B) ending on the date the court enters a final order ruling on the motion.

Retrogression or even harmful aspects of new legislation play little or no role in the Court's assessment of its constitutionality. As now Chief Justice Rehnquist wrote in *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980):

> "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

Id. at 179 n. 12 (*quoting Vance v. Bradley*, 440 U.S. 93, 97 (1979) (footnote omitted in original)).

With that thought in mind a brief historical analysis of the twin concepts of what might be called reform in correctional policy and prison conditions may provide a valuable setting for this decision.

In Colonial times, there were no prisons and certainly no prisons as we know them today. Prisons did not begin to appear until well into the 18th Century. This is not to say the colonists had no philosophy about crime and how to handle perpetrators. In essence, criminals were punished, punished severely and that was that. There was no thought that men and women who had committed a crime could be rehabilitated and go on to live useful lives. Branding on the forehead was a frequent penalty for a first offense; death for a third. The fact that there were no prisons played a large role in the colonists' approach to punishment. In the early 18th Century, we saw the beginnings of our prison system in what were characterized as county jails. Prisoners were placed in rooms or perhaps in a single room; there were no cells and there was no effort to distinguish between or separate men, women or children. For some time and certainly into the second decade of the 18th Century, while there was capital punishment for murder, many serious crimes, including arson, rape and burglary, exacted the forfeiture of property, restitution and relatively brief terms of imprisonment. From the very beginning, con-

ditions in our prisons were marked by overcrowding, fire hazards and poor sanitation. Some of the same conditions which prompted the Consent Decrees in this case and at which the PRLA has taken aim.

Later in the 18th Century in what is known as the age of enlightenment in Europe, the concept of "correctional" reform began to emerge. At the same time, the hazards of prison life became known and changes began to take place. In his volume, *The State of the Prisons*, published in England in 1777, John Howard awakened public opinion with a detailed discussion of the inhuman conditions prevalent in most jails and prisons. The same kinds of problems emerged from Howard's inspection as had plagued the prison business from the beginning. They included poor food or no food; poor ventilation which prompted an increased risk of fire; little or no medical attention and overcrowding.

Following the American Revolution, our new nation embraced the reforms of the enlightenment including attention to correctional reform and to prison conditions. America wanted to begin life as a nation utilizing the most modern concepts in the correctional field and the most modern penitentiaries. Correctional reforms began to appear in new state codes and the theory of reform primarily in the guise of rehabilitation replaced earlier thinking where punishment itself was the only goal. The modern prison emerged during the early decades of the 19th Century and incarceration was viewed as simply one of several correctional goals. It was part of a philosophy that allowed as how "doing time" was not an end in itself. Unfortunately the advent of the modern prison and correctional reform in America failed to have the expected concomitant impact on improved prison conditions, as one author suggests:

> it simply moved corporal punishment indoors where, hidden from public view, it became even more savage . . . For the most part, the general public did not know what went on behind prison walls. But it regarded the prison as a form of punishment and believed that

> the undesirables confined there deserved whatever they got.[3]

Towards the middle of the 19th Century, reform concepts such as parole and the indeterminate sentence emerged and became important correctional tools. The widening use of conditional release and parole resulted in reduced populations in prisons and at the same time was proven in some studies to deter recidivism. Naturally enough, since parole was conditioned on evidence of rehabilitation, prisoners were more amenable to educational and other programs which they were given to understand would accelerate such a finding by the parole board. Parole and conditional release grew up during this period and remained with us for a century until the 1980's when in the federal system at least parole was abolished. Prison conditions varied during the 1800's for the most part prisons during this period remained overcrowded, dirty and poorly ventilated.

Even early in this century, Kate Barnard, an Oklahoma official, reported as follows on a visit to a Kansas prison:

> Prisoners who failed to dig their quota of three cars of coal per day were punished even further. She found one 17 year old, who had been able to mine only two carloads, chained to the wall of the prison. Other punishments included a form of water torture and "the crib," where inmates were thrown with hands and feet tied and drawn together at the back. In addition to the value of the prisoners' labor, the State of Kansas received 48 cents a day for keeping Oklahoma prisoners and paid about 10 cents a day for meals.[4]

Additional reforms particularly new alternatives to incarceration were initiated at or shortly after the dawn of the 20th Century. They included community service and ideas such as

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[3] Samuel Walker, *Popular Justice* 70 (1980). Professor Walker's volume has been most helpful in the construction of this brief history of prison conditions.

[4] *Id.* at p. 149.

work release, which was first passed in Wisconsin with the Huber Law in 1913 and worked its way east and a similar law having been enacted in New York State some half century later, in 1967. Work release programs permit prisoners at least for minor crimes to work during the day and return to their cell in the evening so as to earn some money and to ease their readjustment back into the community.

With the advent of organized crime and the accompanying violence of the 1920's and 1930's, a new "get tough" policy was spawned and for the most part continues to this day. It is unfair to generalize since at different times during the last half century some states have adapted reforms and improved prison conditions dramatically.

Clearly prison conditions have markedly improved since the Kate Barnard revelations, those changes, especially those within the last 20 years, are in some measure attributable to consent decrees of the type before me on this motion to vacate.

For the time being we have settled for a correctional policy that focuses on legislation creating many new crimes with long terms for both the new and the old. Such a "hard time" and longer term policy has, since the inception of our prison system, been accompanied by less attention to prisoners' rights and prison conditions. If this policy had proven effective, it might at least be understandable. It has not.[5] It is interesting to note that the primary result of this policy is the emergence of a growth industry in the prison construction business, state and federal expense budgets for our prisons that have never before reached their current numbers, all at taxpayers' expense, and one million souls in those prisons.[6]

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[5] The most recent study of recidivism available from the Bureau of Justice Statistics, a division of the U.S. Department of Justice, detailed the backgrounds of roughly 700,000 state prisoners in 1991. It found that over 60% of inmates had been previously incarcerated. Further that over 55% had previously been incarcerated within 5 years before their current offense.

[6] The Bureau of Prison reports its salary and expense budget for 1993 equalled 1.783 billion dollars; for 1994, 1.952 billion dollars; and for 1995, 2.309 billion dollars. Eight new prisons set to house 16,397

Dostoyevsky wrote in the middle of the 19th Century, "the degree of civilization in a society is revealed by entering its prisons."[7] In short the fact that this legislation, signed as part of a budget bill and in the midst of an election year, passes Constitutional muster is far from the whole story. Far more important is what will happen to prisoners' rights and the conditions in our prisons as a consequence of this legislation.

LEGISLATIVE HISTORY

While I must examine only those few sections of the PLRA before me, the hearings that examined the bill as a whole are instructive. First it is worth noting that some believe that this legislation which has a far-reaching effect on prison conditions and prisoners' rights deserved to have been the subject of significant debate. It was not. A single Senate hearing before the Judiciary Committee, one substantive House Report, and some floor debate is all we can find. This is so even though Senator Hatch told us that as of January 1994, 244 institutions in 34 jurisdictions were operating under court orders and 24 reported having court-ordered population caps.[8]

The thrust of the criticism which prompted the legislation was that the federal courts had overstepped their authority and

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prisoners are under construction and eleven more, housing an additional 13,112 have been passed and approved by Congress. The one under construction in the metropolitan area will be in Brooklyn at this stage at least, it is more expensive than the others. It will have a capacity of 1,229 prisoners; each cell will cost over $140,000—more than enough to cover four years of tuition at Harvard University. This trend is apparent in New York and across the country too. These figures are just an indication of that trend.

[7] F. Dostoyevsky, The House of the Dead 76 (C. Garnett trans. 1957).

[8] *Hearings on Prison Reform Before the Senate Comm. on the Judiciary*, 104th Cong. 1st Sess. (July 27, 1995) [hereinafter *Senate Hearings*]. The transcripts from these hearings have not been officially printed yet. The Court has relied on unofficial reports provided by the defendants.

were mollycoddling the prisoners in state and local jails. In short, the time had come to let the responsible entities, the municipal and state legislatures, take care of their own correctional facilities. After all, the cost of keeping up with the decrees are state and municipal obligations to be borne by state and municipal taxpayers, why shouldn't they be dictated by state and municipal legislative bodies responsible to their constituents. Senator Abraham made that thought quite clear on the floor of the United States Senate:

> The legislation I am introducing today will return sanity and State control to our prison systems. It will do so by limiting judicial remedies in prison cases and by limiting frivolous prison litigation.[9]

On the cost front, Senator Abraham went on to say:

> People deserve to keep their tax dollars or have them spent on projects they approve. They deserve better than to have their money spent, on keeping prisoners in conditions some Federal judges feel are desirable, although not required by any provision of the Constitution or any law.[10]

Again, the alleged problem and one at which the legislation took aim was the theme throughout much of the testimony before the Senate Judiciary Committee hearing that prisons have gotten too comfortable and they have gotten too comfortable at the hands of federal judges.

Senator Kay Bailey Hutchinson of Texas put it this way:

> Prisons exist for the protection of society—not for the comfort and convenience of criminals. . . . Interference by the federal courts has put the interests of criminals ahead of the interests of victims and law-abiding citizens.[11]

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9 141 Cong.Rec. S14316 (daily ed. Sept. 26, 1995).

10 141 Cong.Rec. S14418 (daily ed. Sept. 27, 1995).

11 *Senate Hearings*, note 8 *supra*.

Conversely, Senator Simon joined Senator Kennedy in voicing concern about the proposed legislation and they aligned themselves with the remarks of Associate Attorney General John Schmidt who noted:

> "The constitutional provision enforced most frequently in prison cases is the Eighth Amendment's prohibition of cruel and unusual punishment. . . . Prison crowding may also be a contributing element in a constitutional violation. For example, when the number of inmates at a prison becomes so large that sick inmates cannot be treated by a physician in a timely manner, or when crowded conditions lead to a breakdown in security and contribute to violence against inmates, the crowding can be addressed as a contributing cause of a constitutional violation."[12]

Senator Hatch again in a statement on July 27, 1995 pretty much caught what is thought to be the temper of the times and to which Congress was responsive when he said:

> Properly understood, prisons serve three fundamental functions: the incapacitation of criminals, the punishment and deterrence of crime, and when possible, the rehabilitation of criminals. Incapacitation is the linchpin on which the others depend—punishment and rehabilitation cannot be accomplished if the criminal is not first incapacitated. If we know nothing else, we know that the criminal who is behind bars is not victimizing other innocent people in society at large.
>
> Punishment is also a vital function of the prison system. Ideally, it instills in the criminal an understanding that breaking society's rules has consequences, and encourages the criminal to reform. The credible threat of serious punishment also should deter persons from committing crimes. Equally important, punishment provides

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[12] 142 Cong.Rec. S2298 (daily ed. March 19, 1996) (*quoting Senate Hearings*, note 8 *supra* (statement of the Honorable John Schmidt, Associate Attorney General of the United States)).

> closure and peace of mind to victims of crime, who too often are forgotten by the criminal justice system.[13]

The legislative history goes on to emphasize that "hard time" for convicted men and women is the only way to protect the public and that more hard time will protect the public more. Neal R. Peirce, a syndicated columnist and author, tells us something about how that trend has come to manifest itself:

> Leg-ironed work crews have recently been instituted in Alabama, Florida, Arizona and Wisconsin. Gov. William Weld (R., Mass.) apparently speaks for many when he argues prisons should be 'a tour through the circles of hell,' where inmates should learn only 'the joys of busting rocks.'
>
> Garner, Georgia's new corrections chief, provides a foreboding picture of what that future might be. Wearing a black uniform and black boots like his own riot squad, he personally leads raids on prisons, a canine unit in tow. The prisoners are herded outside so officers can tear up their cells in search of contraband (often smashing prisoners' Walkman radios in the process).[14]

THE DECLARATIONS

In this matter, each side has submitted extensive declarations along with thousands of pages of exhibits. The exhibits essentially paint a historical survey of the Consent Decrees. The first of such Decrees was entered 18 years ago in 1978 and addressed conditions on Rikers Island and in several jails throughout the City now numbering 16 in all and accommodating today some 16,000 detainees. The conditions that brought about the Consent Decrees are not dissimilar from

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[13] *Senate Hearings*, note 8 *supra*.

[14] Neal R. Peirce, *But in Its Prisons, Georgia Has Reverted to the Bad Old Days*, Philadelphia Enquirer, July 20, 1996, at 19.

those that have plagued our nation from the time of our first prisons. They include environmental health and safety concerns and overcrowding. Interestingly, while the City suggests that each consent decree has added to what they conclude is the micro management mania of today, they neglect to evidence much awareness that each consent decree by definition required their imprimatur. Commissioner Michael F. Jacobson, Commissioner of the Department of Correction, by way of explanation, suggests that the City of New York was in some sense coerced into signing the Consent Decrees and what he characterizes as "court ordered" stipulations. There is testimony at the Senate Judiciary Committee hearing from former Attorney General William Barr to the effect that during his tenure, jurisdictions under the aegis of consent decrees were invited to use his good offices to extricate themselves from such burdens. While Texas, Michigan and Philadelphia took him up on the offer, New York did not.[15]

John Boston, in his declaration on behalf of the plaintiffs goes on to dispute the City's position that while there were many allegations of unconstitutional conditions, none were ever proven. He sets forth constitutional violations both with respect to protracted confinement in receiving rooms and overcrowding. *See Benjamin v. Sielaff*, 752 F. Supp. 140 (S.D.N.Y. 1990); *Benjamin v. Malcolm*, 564 F. Supp. 668 (S.D.N.Y. 1983). Further, Mr. Boston points to the 1970's, as the decade during which cases were brought that alleged overcrowding and other unconstitutional conditions in the prisons, one of which resulted in the City closing the Tombs (a Manhattan jail) rather than make the requisite improvements.

The first consent decree followed the *Benjamin v. Malcolm* trial and was the result of an agreement reached while the matter was *sub judice* following months of negotiations. Tracing the history further, Mr. Boston's declaration outlines how the City failed to comply with the decrees and that it was as a consequence of those repeated failures that in 1981, a motion was made by the plaintiff to hold the City in con-

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[15] *Senate Hearings*, note 8 *supra* (statement of the Honorable William P. Barr, former Attorney General of the United States).

tempt. The City did not deny violations of the decree and rather than litigate the contempt motion, the City agreed to fund the creation of what came to be known as the Office of Compliance Consultants (OCC).

With the advent of OCC, the plaintiffs declare that there continued to be "sluggish movement of the project," Declaration of John Boston dated June 12, 1996, at 5 (*quoting* OCC Third Progress Report 6 (Sept. 23, 1983), and contend that from the get go there was little commitment by the Department of Correction except perhaps at the very top and that any changes that were made were basically cosmetic in nature. The Boston declaration goes on to decry the "stagnate" situation and faltering progress by the City. Thereafter in 1990, the court found it necessary to set out specific steps to be taken by the City in order to achieve compliance with the Consent Decrees. *See Benjamin v. Malcolm*, 156 F.R.D. 561 (1994) conditions evidencing non-compliance continued and resulted in sanctions, See *Benjamin v. Sielaff*, 752 F. Supp. 140 (S.D.N.Y. 1990).

The City was ordered to close certain of its wooden structures on Rikers and in connection therewith, was apprised of considerable fire safety problems that required prompt attention. The plaintiffs contend that there is still non-compliance and OCC in February 1996[16] reports that non-compliance continues at least in the areas of fire safety, maintenance and sanitation. There continue to be problems in other areas as well all agree that improvements have been accomplished due primarily to the time and attention provided by the parties and the Federal court.

Commissioner Jacobson in his declaration suggests that with respect to the bulk of the issues covered in the Consent Decrees and monitored by OCC, there have been few, if any, complaints. With respect to the areas of greatest continuing concern, such as fire safety the City has allegedly made operable every existing fire alarm system and has budgeted $82.8 million for further fire safety enhancements in the jails.

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[16] The reports are issued approximately every four months.

Similarly for maintenance and sanitation, the Commissioner opines that with the new automated software system recently installed, maintenance will improve dramatically and with respect to sanitation, "[i]n general the jails are clean." Jacobson Decl. at 9.

One of this Court's major concerns has been with respect to the wood frame modular units which not only leak but in fact may represent fire safety problems as well. The PRLA, according to the Commission, will trim the micro management problem, as well as the cost, and such legislation is long overdue. He contends that consent decrees such as the ones at issue here, "demean[ ] and demoralize[ ] City officials and employees. Worse yet by denying administration action, the Consent Decrees dissipate initiative and creativity." Jacobson Decl. at ¶ 17.

Stripped of hyperbole and taking history into account, the Declarations suggest federal court oversight of prison conditions was valuable. Now with respect to these constitutional guarantees, at least for the present, the challenge is for the City and the Board of Correction to be vigilant and attentive to those guarantees.

DISCUSSION

As discussed above, defendants motion seeks dissolution of the Consent Decrees currently governing certain conditions in the jails located on Rikers Island and elsewhere in New York City.[17] Defendants rely on the recently effective PLRA which limits certain prospective relief in prison condition litigation and mandates a series of timetables for the duration of prospective remedies after which litigants may seek judi-

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[17] These institutions house all of the City's detainees, i.e., the men and women awaiting trial on state charges as well as those who have pled guilty and are awaiting sentence and those sentenced and awaiting transportation to other institutions. Currently, there are approximately 20,000 men and women housed in New York City jails. The plaintiff classes in these seven related cases include only pretrial detainees and constitute roughly 80% of the total jail population.

cial review to determine if continuing enforcement is required.

Plaintiffs oppose the City's motion on the grounds that retroactive application of the PLRA to the Consent Decrees: (1) violates the Rules Enabling Act; (2) violates the separation-of-powers principles embodied in Article III of the Constitution; (3) denies them equal protection of the laws; and (4) denies them due process. The Court addresses these issues in the order listed based on two fundamental canons of interpretation. First, federal courts must consider and decide on a non-constitutional basis wherever possible. Only when a non-constitutional basis on which a decision may be made cannot be found should the Court reach any constitutional questions. *See, e.g., Jean v. Nelson*, 472 U.S. 846, 854 (1985). Second, when deciding constitutional questions, the court must address the narrower grounds for decision first. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1452 (1995) (*citing Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

The Court notes at the outset that it declines plaintiffs' invitation to consider § 802 of the PLRA as a whole in determining this motion. Defendants based their motion solely on the immediate termination provision in 18 U.S.C. § 3626(b)(2). Therefore that is the only section currently before the Court. The Court should not and will not reach out to determine the constitutionality of provisions not before it. Thus this decision is devoted in its entirety to 18 U.S.C. § 3626(a)(1), (b)(2), and (b)(3), as amended by § 802 of the PLRA, and does not suggest that the balance of the PLRA is or is not constitutional.

I. Rules Enabling Act

The only non-constitutional grounds raised to challenge the immediate termination provision in § 3626(b)(2) is based on the Rules Enabling Act. This Act delegated authority to the Supreme Court to prescribe rules of practice and procedure in the district and circuit courts. 28 U.S.C. § 2072(a). The Act provides further that "[a]ll laws in conflict with such rules

shall be of no further force or effect after such rules have taken effect." *Id.* § 2072(b). Under this clause, statutes that are in direct conflict with a Federal Rule of Civil Procedure are superseded. *See Griffith Co. v. NLRB*, 545 F.2d 1194, 1197 n. 3 (9th Cir. 1976), *cert. denied*, 434 U.S. 854 (1987); *see also Henderson v. United States*, 116 S. Ct. 1638 (1996) (holding the service provision in Fed.R.Civ.P. 4 "conflicts irreconcilably" with the service requirements in the Suits in Admiralty Act and therefore supersedes the statutory rule).

Plaintiffs argue that § 3626(b)(2), which provides for "immediate termination of any prospective relief," conflicts with Fed.R.Civ.P. 60(b). This Rule gives courts the discretion to relieve a party from a final judgment "upon such terms as are just." However, there is no direct conflict here because the two provisions can coexist. A court may still grant relief under Rule 60(b) on a discretionary basis if a party were to move pursuant to that Rule. In § 3626(b)(2), Congress has provided an alternative mechanism that parties may utilize to modify a final judgment. As there is no direct conflict, the PLRA is not superseded by Rule 60(b). *Cf. United States v. Michigan*, No. 1:84 CV 63, slip op. at 7-8 (W.D.Mich. July 3, 1996) (holding that the PLRA's automatic stay provision in 18 U.S.C. § 3626(e) is not superseded by either Fed.R.Civ.P. 60(b) or 62(b)).

II. Separation of Powers

Article III, § 1 of the Constitution provides that "The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Plaintiffs argue that retroactive application of the PLRA violates the separation of powers in that it mandates the reopening of final judgments, *see Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995), prescribes a rule of decision without changing the underlying substantive law, *see United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), and unconstitutionally restricts the remedial jurisdiction of the district courts.

A. Final Judgments

In *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995), the Supreme Court reiterated the concept that Congress could not require courts to reopen final judgments. At issue was § 27A of the Securities Exchange Act of 1934 which modified the statute of limitations applicable to securities fraud claims brought under § 10(b) of that Act. Section 27A(b) required courts to reinstate actions that had been dismissed as time-barred under the old statute of limitations. The Supreme Court held this provision unconstitutional because it violated "the text, structure and traditions of Article III." *Id.* at 1452. The Court found that the "judicial Power" gleaned from Article III of the Constitution includes the power to issue conclusive judgments that finally determine a dispute. *Id.* at 1453. Once the Article III court issues a final judgment, that judgment may not be altered by retroactive legislation. *Id.*

While *Plaut* concluded that Congress may not direct courts to reopen final judgments, the parties to this litigation dispute the definition of a final judgment for separation-of-powers purposes. Plaintiffs contend that finality depends solely on the right to appeal. Once the time for an appeal has lapsed, and the matter becomes *res judicata* binding the parties, the judgment is final and cannot be reopened by congressional enactment. Furthermore, even though the Consent Decrees impose injunctive relief, plaintiffs argue Congress may not alter the prospective effects of these judgments because they are based on alleged violations of the plaintiffs' constitutional rights and Congress has no power to modify the substantive constitutional law underlying the injunctions.

In contrast, defendants argue that the finality inquiry is contextual and depends on the character of the judgment. The rule announced in *Plaut*, defendants contend, applies only to actions at law for damages. Injunctions, such as the Consent Decrees here, entail continuing, supervisory jurisdiction and therefore are not final judgments under *Plaut*. Finally, while Congress cannot change the scope of constitutional rights, defendants contend that it does have the power to limit the remedial jurisdiction of the district courts as it has done in the

PLRA. A review of the relevant precedents convinces the Court that defendants are correct.

As a constitutional question, the finality inquiry for separation-of-powers purposes involves a two-part jurisdictional analysis. The first part looks to whether the federal courts have jurisdiction over the merits of the complaint. Once the availability of further appeal, either to the courts of appeal or the Supreme Court, has been exhausted or waived, the judgment is no longer open to legislative alteration. *See Plaut*, 115 S. Ct. at 1457; *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987); *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir. 1993); *Johnston v. Cigna Corp.*, 14 F.3d 486, 489 n.4 (10th Cir. 1993), *cert. denied*, 115 S. Ct. 1792 (1995); *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 813 (11th Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989). The second part considers the character of the relief awarded and whether the federal courts have retained jurisdiction over the remedial orders entered in the case. Where the suit is an action at law for damages and the judgment has become final for *res judicata* purposes, the judgment is no longer subject to congressional enactments. *See Plaut*, 115 S. Ct. at 1456. Where the judgment imposes an executory decree, though, and the court retains supervisory jurisdiction, the judgment's prospective effects are not final for separation-of-powers purposes. *See Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 818 (D.C. Cir. 1974) (holding that vulnerability to legislative alteration "would seem to depend on the character of the compliance called for"); *Western Union Tel. Co. v. International Bhd. of Elect. Workers, Local Union No. 134*, 133 F.2d 955, 957 (7th Cir. 1943) ("[T]hough a decree may be final as it relates to an appeal and all matters included or embodies [sic] in such a step, yet, where the proceedings are of a continuing nature, it is not final.").

The seminal case in this analysis is *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). In 1852, the Supreme Court issued an injunction mandating that a bridge across the Ohio River either be removed or raised because it obstructed the free navigation of the river. The

Court also awarded the plaintiff costs. Thereafter Congress passed a statute that specifically stated the bridge at issue was lawful and designated it as a post road. After the bridge was destroyed in a storm, Pennsylvania sought to enjoin its reconstruction, but the Court dissolved the initial injunction based on the new statute. In so doing, the Court distinguished between an action for damages and an equitable decree:

> Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respect the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance.

Id. at 431.

The distinction drawn in the *Wheeling* case has been consistently followed. The Court restated this proposition in *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932):

> The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.

Similarly, in *System Federation No. 91, Railway Employees' Department, AFL-CIO v. Wright*, 364 U.S. 642 (1961), the Court held that a district court abused its discretion when it refused to modify a consent decree based on an amendment to the underlying law. The consent decree in *Wright* prohibited union shop agreements which were unlawful under the Railway Labor Act when the decree was entered. Subsequently, however, Congress amended the statute to permit such agree-

ments and the Court held that this change warranted a modification of the consent decree. *See also Plaut*, 115 S. Ct. at 1459 (noting that legislation may affect "the prospective effect of injunctions entered by Article III courts" (*citing Wheeling*)); *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992) (holding consent decree may be modified based on significant changes in facts or law); *Daylo*, 501 F.2d at 817 (finding that the judgment in *Wheeling* was "vulnerable to retroactive legislation only to the extent that the remedy chosen—an injunctive decree rather than damages at law—directly affected public rights"); *Class v. Norton*, 507 F.2d 1058, 1061 (2d Cir. 1974) (holding that *Wheeling* created a "doctrine of judicial deference to legislative revision of a statute upon which a prospective court order is based"); *Johnston*, 14 F.3d at 495 n. 10; *Georgia Ass'n*, 855 F.2d at 812.

These principles are based on the "historic power of a court of equity to modify its decree in the light of changed circumstances." Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2863, at 336 (2d ed. 1995). As the Court wrote in *Swift*:

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent. . . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.

Swift, 286 U.S. at 114, *quoted in Wright*, 364 U.S. at 647. This authority is now codified in Fed.R.Civ.P. 60(b)(5) which provides for relief from a final judgment where "it is no longer equitable that the judgment should have prospective application." *See* Wright, Miller & Kane, *Federal Practice and Procedure* § 2863.

A Rule 60(b)(5) motion, however, does not permit relitigation of the merits of the underlying dispute and is no

substitute for an appeal. *See Schildhaus v. Moe*, 335 F.2d 529, 530-31 (2d Cir. 1964); 7 James W. Moore, et al., *Moore's Federal Practice* ¶60.26[4] (2d ed. 1995). Therefore, Congress may legislate retroactively so as to modify the prospective effects of a judgment that is final for appeal purposes because this does not reopen the merits of the judgment. *Cf. Swift*, 286 U.S. at 119 ("We are not at liberty to reverse under the guise of readjusting."); *Class*, 507 F.2d at 1063.

A judgment is "executory" and involves the "supervision of changing conduct or conditions" within the meaning of *Wheeling*, *Swift* and Rule 60(b)(5) where it compels a party to perform future acts or requires the court to supervise the relationship between the parties. *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1139 (D.C. Cir. 1988). As the Second Circuit recently noted, "[i]n practical terms, these standards mean that judgments involving injunctions have 'prospective application,' while money judgments do not." *DeWeerth v. Baldinger*, 38 F.3d 1266, 1275 (2d Cir.) (interpreting Fed. R. Civ. P. 60(b)(5)), *cert. denied*, 115 S. Ct. 512 (1994).

While neither party argues that the Consent Decrees are nonfinal for appeal purposes in that the time to appeal has expired,[18] the Consent Decrees are executory judgments with prospective effects. They impose injunctive relief over which this Court has retained supervisory jurisdiction. For example, the Court regularly issues orders fining the defendants for violating various provisions of the Consent Decrees and has entertained numerous motions regarding larger-scale enforcement and compliance issues. Recently, the Court modified the provisions regarding law library services for detainees in

[18] As a general rule, parties to a consent decree may not appeal because they are deemed to have waived the right to object to matters within the scope of the judgment. *See, e.g., Nashville, Chattanooga & St. Louis R. v. United States*, 113 U.S. 261, 266 (1885); *New York, by Vacco v. Operation Rescue National*, 80 F.3d 64, 69 (2d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3017 (June 27, 1996) (No. 95-2086); *Christian Science Reading Room v. City and County of San Francisco*, 784 F.2d 1010, 1017 (9th Cir. 1986), *amended by* 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987).

punitive segregation based on a significant change in factual circumstances, *see Benjamin v. Jacobson*, 923 F. Supp. 517 (S.D.N.Y. 1996), and the defendants have filed a motion to vacate selected portions of the Consent Decrees that is currently being briefed by the parties.

Plaintiffs seek to distinguish *Wheeling* on the ground that it stands for the narrower proposition that an injunction is vulnerable to retroactive legislation only to the extent that the legislature may alter the law on which the judgment rests. Since the Consent Decrees here are based on allegations of constitutional violations, Congress lacks the authority to modify the substantive legal standards underlying the injunctions.

Plaintiffs construct this argument on the distinction drawn in *Wheeling* and its progeny between public and private rights. All of the cases in which Congress altered the prospective effects of an injunction, plaintiffs contend, involved decrees that were based on statutes in areas where Congress has plenary power to regulate, not in areas of constitutional rights which Congress may not modify, such as prison conditions. For example, *Wheeling* involved the right of navigation along interstate waterways, while the consent decree at issue in *System Federation v. Wright* was based on a labor relations statute. *See also Hodges v. Snyder*, 261 U.S. 600, 602-03 (1923) (noting the public rights/private rights distinction in a suit to enjoin a consolidated school district that was retroactively legalized by a state statute after an injunction had been issued; the Supreme Court affirmed the dissolution of the original decree based on the new statute). In contrast, the Consent Decrees here are based on alleged violations of the constitutional rights of individual detainees within the plaintiff class. These rights, plaintiffs argue, are private, not public. Thus plaintiffs propose that in determining whether Congress may alter a final judgment, the Court must analyze the character of the relief imposed and the character of the right upon which the relief was based.

Plaintiffs adopt the definition of public rights used by the Supreme Court in determining whether Congress violates the Seventh Amendment when it delegates adjudicatory authority to non-Article III forums, such as administrative agencies.

Under this doctrine, public rights are those at issue in cases that " 'arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,' " *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 n.8 (1989) (*quoting Crowell v. Benson*, 285 U.S. 22, 50 (1932)), or that arise in private disputes based on rights that are closely integrated into a public regulatory scheme. *Id.* at 54.

The public rights doctrine, however, is inapplicable here. When the doctrine was first established in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 15 L.Ed. 372 (1856), which incidentally was decided during the same term as *Wheeling*, the key element was the presence of the United States as a party. While the doctrine has been expanded in more recent cases, this original understanding is relevant to determining the meaning used by the *Wheeling* Court. Under the definition of public rights when *Wheeling* was decided, that case involved private, not public rights because the United States was not a party. This distinction is even clearer in *Hodges* which was both based on a state statute and did not involve the United States. Even today, the public rights doctrine is an expression of congressional authority and therefore must be limited to federal statutes.

Plaintiffs' argument that the source of the underlying right is an essential element of the separation-of-powers analysis must be rejected because the doctrine of separation of powers is concerned with the structural allocation of power in the Constitution, rather than the individual claims in a particular action. The separation-of-powers principles embodied in Article III protect the jurisdiction of the courts from congressional abuse and overreaching. *See Plaut*, 115 S. Ct. at 1453-56 (providing historical review underlying finality doctrine). The doctrine is a structural safeguard, *id.* at 1463, that focusses on the relative power of the courts and Congress. *Id.* at 1457. Article III invests the courts with the power "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and conclusively to decide cases free from

legislative review of final judgments. *Plaut*, 115 S. Ct. at 1453. Only the character of the relief awarded in a final judgment is relevant to the separation-of-powers inquiry because only that factor, and not the source of the underlying right, implicates the power and jurisdiction of the courts. As the Supreme Court noted in *Plaut*, "The issue here is not the validity or even the source of the legal rule that produced the Article III judgments, but rather the immunity from legislative abrogation of those judgments themselves." 115 S. Ct. at 1456.

Perhaps a better explanation of the public/private rights distinction in *Wheeling*, repeated in later cases, is that the Court was merely distinguishing between different types of relief. A close examination of the *Wheeling* decision demonstrates that the Court focused exclusively on the remedy chosen, not the source of the underlying right. In the first *Wheeling* decision, the Court awarded costs and sustained an injunction. Both of these remedies were predicated on the fact that the bridge violated the public right of free navigation. As the Court held, "In both cases, the private right to damages, or to the removal, arises out of the unlawful interference with the enjoyment of the public right, which as we have seen, is under the regulation of congress." *Wheeling*, 59 U.S. (18 How.) at 431. However, because the award of costs had become final, it was "unaffected by the subsequent law." *Id.* In contrast, the executory decree was subject to legislative revision. *Id.* Had the decision rested on the fact that public rights as defined by the plaintiffs, i.e. rights created under the plenary authority of congressional enactment, been involved, both the damages and the injunction would have been held vulnerable. Thus the crucial distinction for separation-of-powers purposes is the character of the relief, not the character of the complaint.

The D.C. Circuit appears to be the only court that has attempted to define the term "public rights," and that court read the term broadly as referring to the relief granted. In *Daylo*, 501 F.2d at 818, the court examined, *inter alia*, *Wheeling*, *Hodges*, and *Wright* and noted that "the judicial decrees at issue called for actions which would have directly affected

the rights of many persons not privy to the judgments, i.e., would have trenched upon 'public rights.' " Indeed, after considering its earlier decision in *McGrath v. Potash*, 199 F.2d 166 (D.C. Cir. 1952), in which the injunction only affected the parties, the court concluded that "[w]hat appears to unite these cases is that the injunctive decrees at issue were 'legislative' in function, attempting to control the legal status of a variety of future actions which the parties, or others, might or might not wish to take." *Daylo*, 501 F.2d at 818. Thus the public/private rights distinction rests on the public nature of the decree, not the public nature of the suit.

Finally, additional support for this analysis is found in the Tenth Circuit's decision in *Johnston v. Cigna Corp.*, 14 F.3d 486 (10th Cir. 1993), *cert. denied*, 115 S. Ct. 1792 (1995). This was a pre-*Plaut* decision that found § 27A(b) of the Securities Exchange Act unconstitutional. In so doing, the court distinguished *Wheeling* and *Hodges* on the ground that "the rights involved were public rights—as opposed to the private rights asserted here—and a judgment declaring a public right may be annulled by subsequent legislation." *Id.* at 492. The securities laws come within Congress' plenary power under the Commerce Clause. Therefore, if a securities fraud action for damages involves private, rather than public, rights, the distinction must not be based on the source of the underlying law. Again what appears dispositive is the character of the relief.

As the Consent Decrees embody executory relief over which the Court has retained supervisory jurisdiction, they are subject to alteration by retroactive legislation. Therefore, this Court finds that the section of the PLRA at issue here, 18 U.S.C. § 3626(b)(2), does not reopen final judgments in violation of the separation-of-powers principles outlined in *Plaut*. *See Plyler v. Moore*, Civ.A. No. 3:82-876-2 (D.S.C. June 4, 1996) (bench ruling).

B. Rules of Decision

Plaintiffs also argue that the PLRA violates the rule of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), because

it prescribes a rule of decision without changing the underlying law.

Klein involved a suit to recover the proceeds of cotton abandoned by a Confederate sympathizer during the Civil War to United States Treasury Agents. The rebel, V.F. Wilson, later received a presidential pardon and swore an oath of loyalty to the Union. His administrator, Klein, sought recovery of the funds for his estate and the Court of Claims ruled in his favor based on a statute providing for such awards to former members of the Confederacy who were pardoned by the President and swore an oath of loyalty. However, while the case was on appeal to the Supreme Court, Congress passed a new statute mandating that presidential pardons could not be considered as evidence of loyalty, rather that such pardons were conclusive evidence of disloyalty and that if judgment had already been rendered the Supreme Court must dismiss the case for lack of jurisdiction.

The Supreme Court rejected the statute because, inter alia, it impermissibly imposed a rule of decision for pending cases. The Court distinguished its decision in *Wheeling* because in that case Congress had left the courts free "to apply its ordinary rules to the new circumstances created by the act." *Id.* at 147.

Klein has been interpreted to hold that Congress may not prescribe a rule of decision for the courts to follow without any independent exercise of their judicial powers. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 391-92 (1980). To affect the outcome of a pending case, Congress must amend the applicable law. *See Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993) ("The rule of *Klein* precludes Congress from usurping the adjudicative function assigned to the federal courts under Article III. However, *Klein* does not preclude Congress from changing the law applicable to pending cases."); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1573 (11th Cir. 1992) (upholding § 27A(a) of the Securities Exchange Act, which was not at issue in *Plaut*, against a *Klein* challenge because "the Act does not require courts to make any particular findings of fact or applications of law to fact"), *cert. denied*, 510

U.S. 828 (1993); *see also Robertson v. Seattle Audubon Society*, 503 U.S. 429, 438-39 (1992) (upholding statute against separation-of-powers challenge based on conclusion that the new statute "compelled changes in law, not findings or results under old law" without conclusively interpreting *Klein*).

Plaintiffs argue that, as in *Klein*, Congress has denied this Court the power independently to decide the present motion. Rather, Congress has prescribed a rule of decision. The Court may only look at the record and determine if there was ever a finding of a constitutional violation. If there was not, then the Court must vacate the decrees, just as in *Klein* where the Supreme Court was directed to dismiss the suit if it was based on a presidential pardon. Furthermore, plaintiffs contend that Congress did not amend the applicable law because it lacked the authority to alter constitutional rights.

However, while Congress did not amend the substantive law with respect to permissible prison conditions, it did change the law governing the district court's remedial powers. Under the new law, courts must apply the same limitations on relief to consent judgments as to litigated judgments. This restriction is an obvious change. Prior to the PLRA, a court could enter a consent judgment as long as it is within the court's subject matter jurisdiction, comes generally within the scope of the pleadings and furthers the objectives of the law upon which the complaint is based. *Local Number 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986); *see also id.* at 525 ("Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after trial."). Furthermore, the power to enter the decree carries with it the power to enforce the decree with relief that is broader than that which could be granted after trial. *See Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989).

In *Rufo*, for example, where the consent decree addressed the appropriate remedy after the district court had found a constitutional violation, the Court held that the district court did not abuse its discretion in entering the decree even though it provided more relief that "what a court would have ordered

absent the settlement." *Rufo*, 502 U.S. at 389. The Court also held that when the changed circumstances warrant a modification of a consent decree, the court should not "strive to rewrite a consent decree to the constitutional floor." *Id.* at 391. Rather, the court should only address the changed circumstances and modify the decree "only to the extent that equity requires." *Id.* In contrast, the PLRA requires the court to vacate prison condition decrees or modify them to the constitutional floor.

Accordingly, since the PLRA "compel[s] changes in law, not findings or results under old law," *Seattle Audubon*, 503 U.S. at 438, it does not violate the separation-of-powers principles established in *Klein*.

C. Restrictions on Remedial Jurisdiction

Next plaintiffs argue that the PLRA divests courts of remedial jurisdiction to such a degree that the courts are no longer able effectively to vindicate constitutional rights. Article III, § 1 gives Congress the power to "ordain and establish" the lower federal courts and the Supreme Court has held that this clause gives Congress the authority to limit the jurisdiction of the district courts. However, plaintiffs cite several academic theorists and dicta in recent Supreme Court decisions for the proposition that Congress may not completely strip the lower courts of their enforcement powers.

The Supreme Court discussed the power of Congress to control the remedial jurisdiction of the lower federal courts in *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938). There the Court upheld the Norris-LaGuardia Act which denied federal courts jurisdiction to issue injunctions in labor disputes unless the court made particular findings of fact delineated in the statute. The Court held that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." *Id.* at 330.

The Norris-LaGuardia Act is analogous to the PLRA and thus *Lauf* applies here. Under the PLRA prospective relief is only permitted if the court finds that a violation of a federal right exists and that the prospective relief "is narrowly drawn,

extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1). As in *Lauf*, Congress has conditioned the exercise of a court's remedial jurisdiction on the existence of particular facts that must be demonstrated on the record.

In *Lockerty v. Phillips*, 319 U.S. 182 (1943), the Court reiterated the principles expressed in *Lauf*. *Lockerty* involved a challenge to the Emergency Price Control Act which assigned jurisdiction over disputes arising under that Act to the Emergency Court of Appeals and denied jurisdiction to any other court, state or federal. According to the *Lockerty* Court, "[t]he Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' " *Id.* at 187 (citations omitted).

The Court need not enter the extensive academic debate surrounding the power of Congress to control the jurisdiction of the district courts, however, because it is clear that § 3626(b), the only section directly at issue here, preserves the Court's ability to enforce constitutional rights. Under § 3626(b)(3), a court may not vacate prospective relief if it finds on the record that constitutional violations exist and that the relief is appropriately tailored to remedy the violation. While seemingly cramped by the new legal standards in § 3626(a)(1) and the time constraints imposed in § 3626(e), it is nonetheless fair to say that courts will continue to define the scope of prisoners' constitutional rights, review the factual record, apply the judicially determined constitutional standards to the facts as they are found in the record and determine what relief is necessary to remedy the constitutional violations. Thus cases such as *Webster v. Doe*, 486 U.S. 592 (1988), and *Johnson v. Robison*, 415 U.S. 361 (1974), are inapplicable. In those decisions, the Supreme Court interpreted statutes to permit judicial review of constitutional claims in order to avoid the serious constitutional

questions that would be raised if the statutes precluded such review.

While one might conclude from a reading of the legislative history that what Congress sought was to deny courts the power to enforce constitutional rights, another reader could conclude that Congress wanted to limit that relief to a minimum. As the House Report found:

> The dictates of the provision [in § 3626(a)(1)] are not a departure from current jurisprudence concerning injunctive relief. "In granting injunctive relief, the court's remedy should be no broader than necessary to provide full relief to the aggrieved plaintiff." *McLendon v. Continental Can Co.*, 908 F.2d 1171, 1182 (3d Cir. 1990) (citations omitted). This rule also applies to constitutional violations. See *Milliken v. Bradley*, 433 U.S. 267, 97 S. Ct. 2749, 2757 (1977) (remedy must be related to the condition that offends the Constitution); *Toussaint v. McCarthy*, 801 F.2d 1080, 1086 (9th Cir. 1986) (injunctive relief must be "no broader than necessary to remedy the constitutional violation"), *cert. denied*, 481 U.S. 1069 (1987).

H.R.Rep. No. 21, 104th Cong., 1st Sess. 24 n. 2 (1995); *see also Rufo*, 502 U.S. at 389 ("Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated."); *Lewis v. Casey*, No. 94-1511, 1996 WL-340797, at *7 (U.S. June 24, 1996) ("The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established."). The Fifth Circuit recently noted that the requirements in § 3626(a)(1) are in accord with that circuit's prior law. *See Williams v. Edwards*, No. 95-30835, 1996 WL 335834, at n.21 (5th Cir. June 19, 1996). Indeed, plaintiffs concede that § 3626(a)(1) is similar to the standard for injunctive relief granted on the basis of a litigated judgment. *See* Pl. Mem. at 47 (*citing Toussaint*, 801 F.2d at 1086-87).

What Congress has done here that has changed the law significantly is to apply the standards for a litigated judgment to all judgments, including those entered on consent. Although plaintiffs contend this will prevent any cases from settling, and this view is supported by the testimony of Associate Attorney General John Schmidt before the Senate Judiciary Committee, *see Senate Hearings*, note 8 *supra*, such policy questions are for Congress to resolve. This Court can only consider whether Congress has acted within its authority or overstepped the restraints imposed by Article III. As the Court does not find that its jurisdiction has been restricted unconstitutionally, its inquiry is complete.

III. Equal Protection

Plaintiffs also attack the PLRA on equal protection grounds, arguing that the Act violates the equal protection component of the Fifth Amendment. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975). This challenge is based on the Act as a whole; plaintiffs contend that only unconstitutional animus could have driven Congress to pass a statute like this that erects such high hurdles for plaintiff's in prison conditions and prisoners rights litigation. Unfortunately, as noted above, the Court is unable to consider the entire Act since much of the Act is not before me. Sections 3626(a)(1), (b)(2), and (b)(3) are all that are at issue here.

Equal protection principles recognize that most legislation discriminates between different individuals to advance legislative objectives and that such classification may disadvantage certain groups or individuals. *See Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996). The initial inquiry, then looks to the nature of the classification to determine the proper level of scrutiny to be applied to the statute.

Plaintiffs' arguments that the PLRA should be reviewed under strict scrutiny are not persuasive. Such scrutiny is applied to laws that utilize classifications that for historical reasons are considered " 'constitutionally suspect,' " such as race, *see McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (*quoting Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)), or that

burden a fundamental right, such as the right to vote, *see Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667, 670 (1966). Plaintiffs concede that pretrial detainees are not a suspect class, but contend that the PLRA burdens the fundamental right of access to the courts. Although defendants apparently agree that this right is constitutional in nature and thus fundamental for equal protection purposes, *see Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982), they argue that the sections of the PLRA at issue here do not burden this right as recently defined by the Supreme Court. The prisoner's right of access to the courts has been essentially limited to "a right to bring to court a grievance that the inmate wished to present." *Lewis*, 1996 WL 340797, at *5; *see also id.* at *6 (holding right of access to courts only requires that prisons provide inmates with the tools needed "to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement"). The provisions granting immediate termination of prospective relief in the PLRA do not implicate this right of initial access to commence a lawsuit. Therefore, strict scrutiny is inappropriate.[19]

Laws that do not burden fundamental rights or target suspect classes, are granted a strong presumption of constitutionality and will be upheld if there is a rational relationship between the disparate treatment and a legitimate governmental purpose. *See Heller v. Doe*, 509 U.S. 312, 319-20 (1993). The rational relationship test is applied to "ensure that

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[19] Plaintiffs also argue that given the fundamental nature of the rights at stake, intermediate scrutiny is proper. Such scrutiny has been applied to legislative classifications based on gender and illegitimacy. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (gender); *Mills v. Habluetzel*, 456 U.S. 91, 98-99 (1982) (illegitimacy). However, plaintiffs have not provided any analysis that demonstrates a valid analogy between these classifications and a classification based on incarceration status.

At oral argument, plaintiffs also proposed that the Supreme Court has in fact developed a third category of heightened scrutiny which can be roughly called rational review plus. Plaintiffs argued that the Court has applied this standard to legislation that burdens individual, rather than economic, rights. However, plaintiffs provided no specific support for this proposition.

classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 116 S. Ct. at 1627. However, the Supreme Court has repeatedly emphasized that "rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' " *Heller*, 509 U.S. at 319 (*quoting FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). Therefore, "[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer*, 116 S. Ct. at 1627.

Under rational basis review, the Court first seeks any legitimate purpose for the statute. Legislative classifications " 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' " *Heller*, 509 U.S. at 320 (*quoting Beach Communications*, 508 U.S. at 313). Furthermore, " 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' " *Id.* (*quoting Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Next, the Court considers whether the statute is reasonably related to the governmental interest. Mathematical precision, however, is not required. Rather, "courts are compelled under rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.* at 321; *see also United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980).

Plaintiffs argue that Congress was motivated solely by animus towards prisoners when it enacted the PLRA and therefore the statute lacks any rational basis. They rely primarily on the Supreme Court's recent decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996), striking down Colorado's Amendment 2.[20] Amendment 2 prohibited Colorado or any of

[20] In addition to *Romer*, plaintiffs point to several cases in which the Supreme Court struck down state laws that impermissibly discriminated against criminal defendants and sentenced inmates. In *James v. Strange*, 407 U.S. 128 (1972), the Court invalidated a Kansas statute that

its political subdivisions from enacting or enforcing any law that protected men and women from discrimination on the basis of their sexual orientation. Thus Amendment 2 barred all governmental action, legislative, executive or judicial, at any level that protected the burdened class. *Id.* at 1623.

Central to the Court's analysis in *Romer* was the breadth of the disadvantages imposed by Amendment 2. The Court noted the "sweeping and comprehensive" changes in the legal status of gays and lesbians under Amendment 2, and described in detail how the Amendment singled out this group for disfavored treatment "with respect to transactions and relations in both the private and governmental sphere." *Id.* at 1625. The Court held that the Amendment "is itself a denial of equal protection of the laws in the most literal sense" because it declared that "in general it shall be more difficult for one group of citizens than for all others to seek aid from the government." *Id.* at 1628. In addition, the Court found that the breadth of the Amendment was so discontinuous with any of the proposed government interests that could be advanced that

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provided for recoupment of legal fees expended for the representation of indigent criminal defendants but denied these individuals the protections afforded to other civil judgment debtors. Even though the Court recognized that recoupment of counsel costs may be a legitimate interest, the Court found that the classification lacked any rationality. Instead, the Court found that the law "embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." *Id.* at 142. Similarly, in *Baxstrom v. Herold*, 383 U.S. 107 (1966), the Court rejected a New Jersey statute that provided different procedures for the civil commitment of mentally ill incarcerated individuals at the end of their prison terms than for all other individuals. Finally, in *Rinaldi v. Yeager*, 384 U.S. 305 (1966), the Court struck down a New Jersey statute that required sentenced inmates to repay the state for the costs of a trial transcript used on an appeal. The statute applied only to incarcerated convicts, not to those sentenced to pay a fine, who received a suspended sentence or who were placed on probation. The Court found that this classification violated the Equal Protection Clause. *Id.* at 311.

What unites these cases is that none of the statutes were rationally related to the advancement of a legitimate government interest. However, as discussed below, they are not directly applicable here because the PLRA is rationally related to a legitimate government interest and therefore survives rational basis review.

there was no rational relationship between the State's ends and the means chosen to further them. *Id.* at 1628-29. Instead, the classification appeared to be driven solely by animus, "undertaken for its own sake," and therefore was unconstitutional. *Id.* at 1629.

Although the PLRA also singles out a unique group for particular treatment, it does not violate the principles set forth in *Romer*. This Act is sufficiently narrower in scope. In addition, the Court must conclude that the PRLA is a properly tailored approach to further legitimate congressional objectives.

First, the PLRA only limits the authority of the judiciary, rather than all three branches of government. Although the current political environment makes it unlikely that the legislature or executive branches would be receptive to calls for prison reform from prisoners themselves, these branches remain free to protect the interests of prisoners. More importantly, unlike Amendment 2 which imposed a complete prohibition on the enforcement of the rights of certain men and women, the PLRA does not bar judicial enforcement of prisoners' federal rights. As discussed above, § 3626(b)(3) specifically permits courts to sustain their remedial orders if the court finds that violations have not been fully corrected and that the relief remains necessary. Therefore, in the PLRA, Congress did not "deem a class of persons a stranger to its laws." *Romer*, at 1629.

The PLRA also passes the traditional rational relationship requirements of equal protection analysis. The law is supported by plausible legitimate government interests and the means chosen to advance these goals are rationally designed.

The Court notes at the outset that the legislative history suggests that there was significant animosity towards prisoners in Congress. The debates on the Senate floor appear to be more rhetoric than reason and hardly extensive. In addition, it is important to note that the plaintiffs here, as pretrial detainees, may not be punished. *See Bell v. Wolfish*, 441 U.S. 520 (1979). Therefore the long diatribes on the Senate floor about the importance of punishment do not provide a legitimate interest as applied to the plaintiff class.

There are, however, legitimate interests that Congress could and probably did seek to advance in the PLRA. So long as there exists a single, reasonably conceivable basis that is legitimate, the Court under rationale basis review must conclude that Congress sought to advance that goal and uphold the statute. *See Heller*, 509 U.S. at 320. As defendants argue, Congress could have been motivated by a concern that federal courts had ignored the proper limits that federalism principles impose on federal court supervision of state and local prisons. In the PLRA, Congress sought to ensure that federal courts return control over prison management to democratically accountable state and local governments as soon as federal court supervision became unnecessary to remedy a demonstrated, ongoing constitutional violation. Congress could also have wanted to create a uniform national standard for consent and litigated judgments based on a belief that consent judgments, even though agreed to initially, imposed severe burdens on states and local governments and that these burdens exceeded what was constitutionally required. These are legitimate interests.

In addition, although it is not required that Congress specifically articulate its rationale on the record, *see Heller*, 509 U.S. at 320, there is support for these claimed interests in the legislative history. The Senate Judiciary Committee held hearings at which experienced law enforcement officials discussed the special burdens imposed by federal court consent decrees. *See Senate Hearings*, note 8 *supra*. As a consequence, I am constrained to conclude that plaintiffs have failed to carry their burden of disproving every possible basis that could support the statute.

The PLRA is also rationally related to the advancement of these goals. Congress was concerned that federal courts had maintained jurisdiction over consent decrees that provided relief beyond what the constitution required. In an effort to combat this, Congress mandated that defendants have the right to seek judicial review of the consent decrees that had been entered without any finding of an actual violation of a federal right and any consideration of whether the relief granted was narrowly tailored to address that violation. 18

U.S.C. § 3626(b)(2). If the Court finds that violations do exist and the relief is appropriately tailored, the relief can continue or, if it is not so tailored, it can be modified to meet the new standards of the Act. *Id.* § 3626(b)(3). This is plainly a rational mechanism for obtaining congressional objectives.

Indeed, plaintiffs do not propose an alternate method. Rather, they argue that the Act is not rationally related to any federalism concerns because it is limited to prison conditions litigation and does not apply to other types of consent decrees. However, Congress may determine that the problems of prison conditions consent decrees involve unique issues that are more pressing and in need of reform. Equal protection principles do not require that the remedies available for violations of different rights be identical.

In *Crawford v. Los Angeles Board of Education*, 458 U.S. 527 (1982), the Supreme Court upheld an amendment to the California constitution that is analogous to the PLRA. This amendment, known as Proposition 1, prohibited state courts from granting relief in school desegregation cases that went beyond what federal courts would award under the Fourteenth Amendment. In rejecting the argument that the state courts must be permitted to award the same relief for all violations of state constitutional rights, the Court held that "[r]emedies appropriate in one area of legislation may not be desirable in another. The remedies available for violation of the antitrust laws, for example, are different than those available for violation of the Civil Rights Acts." *Id.* at 542. Thus the state did not create a "dual constitution" when it chose "to go beyond the requirements of the Federal Constitution in some areas but not others." *Id.* at 542 n.28. Indeed, the Court held that "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." *Id.* at 535. Similarly, here the PLRA sets a uniform standard for relief for litigated and consent judgments in prison conditions litigation cases. As the standard for litigated judgments set by the Supreme Court is plainly constitutional, Congress could not have acted unconstitutionally in limiting enforcement of consent decree relief to the same standard. Furthermore, as in *Crawford*, nothing

required Congress to set the same rules for all types of litigation.

The Supreme Court's decision in *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175 (1980), is also instructive. There Congress passed a statute to phase out the ability of retired railroad workers to receive both social security and railroad retirement benefits. Under the statutory scheme, railroad employees were classified based on their length of service in the industry, whether they were connected with the industry at the changeover date, and whether they had retired as of the changeover date. The Court upheld the classification under rational basis review. "Because Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits." *Fritz*, 449 U.S. at 177. As for the rational tailoring requirement, all the Court demands is that Congress not act in "a patently arbitrary or irrational way." *Id.* at 176-77. Likewise, here Congress could have modified the standards for consent decrees in all types of cases, but nothing required it to do so. Therefore, Congress' determination to single out prison reform litigation was within its power and judging from the temper of the times not a surprise.

Accordingly, application of § 3626(b)(2) to the Consent Decrees does not deny plaintiffs equal protection of the laws.

IV. Due Process

Plaintiffs claim that retroactive application of the PLRA denies them due process because such application violates the "vested rights" doctrine and the limitations placed upon Congress' ability to affect contracts.

A. Vested Rights

Plaintiffs argue that the Consent Decrees are vested rights that Congress may not alter by legislation without violating their due process rights. Defendants respond that the Consent

Decrees are not vested rights because they include prospective relief that may be modified.

In *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898), the Supreme Court held that:

> It is not within the power of a legislature to take away rights which have been once vested by judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

Thus the vested rights doctrine is based on the proposition " 'that rights fixed by judgment are, in essence, a form of property over which legislatures have no greater power than any other [property].' " *Axel Johnson Inc.*, 6 F.3d at 83 (*quoting Georgia Ass'n*, 855 F.2d at 810)) (alteration in original); *see also Johnston*, 14 F.3d at 490; *Tonya K. by Diane K. v. Board of Education of Chicago*, 847 F.2d 1243, 1247-48 (7th Cir. 1988).

The principle that parties have vested rights in a court judgment is essentially the due process analog of the separation-of-powers doctrines discussed in *Plaut*. Indeed, before *Plaut* was decided, the vested rights doctrine was described as having two components. One is the due process component on which plaintiffs rely here. The second is the separation of powers component that was later relied on in *Plaut*. *See, e.g.*, *Axel Johnson Inc.*, 6 F.3d at 83-84; *Johnston*, 14 F.3d at 490-91; *Georgia Ass'n*, 855 F.2d at 810; *Tonya K.*, 847 F.2d at 1247.

Therefore, the analysis under *Plaut* is fully applicable here. Both doctrines are based on the finality of the underlying judgment. Plaintiffs Plaintiffs do not have any vested rights in the prospective effects of the Consent Decrees because they are not final judgments within the scope of the vested rights doctrine. *See Williams*, 1996 WL 335834 at *5 ("[I]t is well settled that consent decrees once entered remain dynamic."). Accordingly, application of the PLRA does not deny plaintiffs due process of law.

B. Impairment of Contracts

Next, plaintiffs contend that application of the PLRA to the Consent Decrees would unconstitutionally impair their contracts with the defendants. Although defendants argue that for purposes of the vested rights doctrine consent decrees are not actually contracts, see Def.Mem. at 53, they apparently concede that consent decrees are sufficiently contractual in nature to fall within the Due Process Clause. *See Rufo*, 502 U.S. at 378 ("A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature."); *Local Number 93*, 478 U.S. at 519 ("[B]ecause their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts.").

The Supreme Court set forth the standard of review of federal legislation that impairs private contractual relations in *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451 (1985). The Court first examines the statute to determine if it alters contractual obligations to such a degree that the modification rises to the constitutional level. *Id.* at 472. If that standard is satisfied the Court must examine the statute more closely. However, "[w]hen the contract is a private one, and when the impairing statute is a federal one, this next inquiry is especially limited, and the judicial scrutiny quite minimal. The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and 'establish that the legislature has acted in an arbitrary and irrational way.'" *Id.* (citations omitted).

Plaintiffs' argument that the PLRA should be subjected to a form of heightened scrutiny is not well taken. Where the federal government is a party to a contract, the statute will be analyzed under the "sovereign acts" doctrine. *See Bowen v. Pub. Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 52 (1986). This doctrine provides that Congress may abrogate contracts through general legislation, but may not specifically target a class of contracts to which it is a party. *See Resolution Trust Corp. v. FSLIC*, 25 F.3d 1493, 1501 (10th Cir. 1994).

The flaw in plaintiffs' argument is that the federal government is not a party to these Consent Decrees. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), does not support plaintiffs' contention that state contracts should be treated the same as federal contracts. *Garcia* involved a challenge to the application of the Fair Labor Standards Act to a state entity on the grounds that Congress lacked the power under the Commerce Clause. The Court found that one mechanism through which states could protect their interests from congressional overreaching was their representation of the states in the federal government. *Id.* at 550-52. However, the fact that state representation in the national legislature is deemed a structural safeguard protecting the states in the balance of federalism concerns does not imply that the states are represented to such a degree that federal legislation benefiting state governments are so tainted by self-interest that heightened scrutiny is required. Plaintiffs have cited no authority to support such a proposition.

Therefore, under *National Railroad*, rational basis review must be applied. As discussed above, the Court concludes that the PLRA is constitutional under this standard and the provisions of the PLRA at issue here are not "arbitrary and irrational."

V. Statutory Construction and Application

Having concluded that the relevant sections of the PLRA are constitutional, the Court must determine how the Act affects the Consent Decrees. Section 3626(b) requires immediate termination of the prospective relief in the Consent Decrees "if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(b)(2). The Act places a significant limitation on this provision in the next subsection, however. Section 3626(b)(3) provides that prospective relief should not be terminated "if the court makes written findings based on the record that

prospective relief remains necessary to correct a current or ongoing violation of the Federal right" and meets the other requirements set forth in § 3626(b)(2).

Plaintiffs have conceded that the newly required findings were not made when the Consent Decrees were entered in 1978-1979 and in addition, that there is not a record before the Court on which findings could be made that would satisfy the requirements of § 3626(b)(3). Although the plaintiffs, seemingly joined by the United States, ask that the Court postpone a decision on this motion pending an opportunity to create a factual record of the current conditions in New York City jails, the Court is constrained to deny this oral request. The language of the PLRA is clear and, as discussed above, constitutional. The statute provides for "immediate termination" and based on the current record before the Court, the defendants are entitled to vacatur of the Consent Decrees.

The Court notes that two courts have held the automatic stay provisions in § 3626(e) unconstitutional. *See United States v. Michigan*, No. 1:84 CV 63 (W.D. Mich. July 3, 1996); *Hadix v. Johnson*, No. 80-CV-73581-DT (E.D. Mich. July 6, 1996). While this Court shares some of the concerns expressed by those courts, I need not decide the issue because I have disposed of this motion within the requisite time period.[21]

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[21] This motion was filed on May 24, 1996. Under § 3626(e), the automatic stay was to go into effect on June 23, 1996. The defendants agreed to treat the Consent Decrees as binding until July 23, 1996 to accommodate the request of the United States for additional time to submit a memorandum of law on the constitutionality of the Act.

CONCLUSION

For the reasons discussed above, the Court concludes that the relevant sections of the PLRA are constitutional. Accordingly, the Consent Decrees in these cases are VACATED pursuant to 18 U.S.C. § 3626(b)(2).

SO ORDERED.

Dated: New York, New York
July 23, 1996

/s/ HAROLD BAER, JR.
U.S.D.J.

UNITED STATES DISTRICT COURT
FILED APR 2 1979
S.D. of N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

JAMES BENJAMIN, MIGUEL GALINDEZ, BRUCE HAYES, JOSE SALDANA and ROBERT ESCHERT, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated.

75 Civ. 3073 (MEL)

Plaintiffs,

-against-

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York; ARTHUR RUBIN, Warden, New York City House of Detention for Men; GERARD BROWN, Deputy Warden, New York City House of Detention for Men; and ABRAHAM D. BEAME, Mayor of the City of New York, individually and in their official capacities,

PROPOSED PARTIAL FINAL JUDGMENT BY CONSENT

Defendants.

----------X

Plaintiffs having brought this action on June 24, 1975,

challenging certain conditions of confinement and practices at the New York City House of Detention for Men ("HDM") as violative of their rights under the United States Constitution; and defendants having denied that plaintiffs' rights under the Constitution have been violated; and the Court having certified this case as a class action on September 26, 1975, the class consisting of all detainees who are or will be incarcerated at HDM; and the parties having agreed that it is in the best interests of all the parties that certain issues concerning conditions at HDM and its annex known as C-71 be resolved without further litigation, and having entered into a Stipulation for Entry of Partial Judgment, dated November 29, 1978, which is attached; and notice of which has been given to the plaintiff class; and the parties having also entered into a Supplemental Stipulation, dated March 14, 1979, which is attached; and the Court having held a hearing on March 10, 1979, at which it considered the fairness and reasonableness of the attached Stipulations and comments received from members of the plaintiff class;

Now, upon the consent of the attorneys for the parties, and upon full consideration of the Stipulation for Entry of Partial Final Judgment, the Supplemental Stipulation, and the comments received from members of the plaintiff class; and having found that the terms of the Stipulations are fair, adequate, and reasonable to all members of the plaintiff class and that there is no just reason for the delay of entry of partial final judgment in accordance with the attached Stipulations, it is hereby

ORDERED, ADJUDGED and DECREED that such Stipulation for Entry of Partial Final Judgment and Supplemental Stipulation, copies of which are attached to and incorporated in this Judgment, are approved and adopted as

the Judgment of this Court in full settlement and compromise of the issues which they address; and it is further

ORDERED, ADJUDGED and DECREED that this judgment shall supercede any previous orders or judgments of the Court which address those issues resolved herein; and it is further

ORDERED, ADJUDGED and DECREED that this Court shall retain jurisdiction over the provisions of this Judgment; and it is further

ORDERED, ADJUDGED and DECREED that the plaintiff class shall be notified of the entry of this Partial Final Judgment by Consent as provided for in the attached Stipulation, dated November 29, 1978.

Dated: New York, New York
March 30, 1979

s/ Morris E. Lasker
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

JAMES BENJAMIN, MIGUEL GALINDEZ, BRUCE HAYES, JOSE SALDANA and ROBERT ESCHERT, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated.

75 Civ. 3073 (MEL)

Plaintiffs,

-against-

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York; ARTHUR RUBIN, Warden, New York City House of Detention for Men; GERARD BROWN, Deputy Warden, New York City House of Detention for Men; and ABRAHAM D. BEAME, Mayor of the City of New York, individually and in their official capacities,

STIPULATION FOR ENTRY OF PARTIAL FINAL JUDGMENT

Defendants.

----------X

Plaintiffs having brought this action on June 24, 1975, challenging certain conditions of confinement and practices at the New York City House of Detention for Men as violative of their rights under the United States

Constitution; and defendants having denied that plaintiffs' rights under the Constitution have been violated; and the Court having certified this case as a class action on September 26, 1975, the class consisting of all detainees who are or will be incarcerated at the House of Detention for Men; and the case having been tried before the Court; and the parties now having agreed that it is in the best interests of all the parties that certain issues concerning conditions at the House of Detention for Men and the annex known as C-71 (hereinafter "HDM") be resolved by consent;

It is HEREBY STIPULATED by and between the undersigned attorneys for the plaintiffs and the defendants herein, and subject to approval by the Court after notice is given to the plaintiff class, that the following agreement will be incorporated in a partial final judgment by consent in this case:

A. POSSESSION AND RECEIPT OF CLOTHING ITEMS

1. Defendants shall permit all detainees to receive clothing by the following means:

a. Visitors shall be permitted to bring clothing to the institution for detainees during regular visiting hours.

b. Clothing also may be hand-delivered to the institution by any person at any regularly scheduled visiting hour or, if necessary for a court appearance on the following day, at any hours between 8 A.M. and 9 P.M., and at any additional hours deemed appropriate by defendants; and, by a date yet to be determined in accordance with the

terms set forth in paragraph EE, infra, clothing may be mailed to the institution or delivered there by package delivery service.

c. Defendants shall provide a receipt for each personally delivered package.

d. Defendants shall deliver such clothing to the intended recipient within 48 hours of its delivery to the institution, unless needed more promptly for a court appearance or other emergency.

e. Defendants shall not require prior notification or approval for receipt of clothing, nor shall they require any written or printed form to accompany incoming clothing.

2. Defendants shall permit detainees to wear all items of clothing which are generally acceptable in public and which do not constitute a threat to the safety of the institution. Such clothing shall include, among other items, shorts, cut-off pants, neck-ties, belts, hats, worn and new shoes; and items

a. worn by the detainee upon admission to the institution;

b. received by the detainee, after admission, from any source.

3. Nothing in this stipulation shall be construed as addressing the question of whether defendants are required to provide clothing to detainees or the question of whether defendants at a future date may require detainees to wear uniforms.

B. INSPECTION OF CLOTHING

Defendants shall maintain the following practices with

respect to the inspection of clothing received by the institution for delivery to detainees:

1. In the course of inspection of such clothing for contraband, the clothing may be ripped, torn or cut only if such action is authorized in writing by a captain or higher ranking officer based on his/her assessment that there is reasonable suspicion to believe contraband is concealed in the article of clothing, and that such procedure is necessary in the particular case for adequate inspection and that a less destructive means of inspection will not suffice; the written authorization shall set forth the basis for the decision.

2. Where ripping, tearing, or cutting of clothing is authorized according to subparagraph 1 above, clothing shall be taken apart in the least destructive manner required to accomplish the inspection found to be necessary.

3. In each case where clothing is ripped, torn, or cut in the course of inspection, and not thereafter lawfully retained by the defendants, defendants shall promptly and adequately repair or have repaired each affected item of clothing prior to delivery to the intended recipient.

4. Defendants shall promptly deliver each repaired article of clothing, together with a copy of the written authorization which permitted it to be ripped, torn or cut, to the intended recipient.

C. INMATE JEWELRY

Defendants shall permit detainees to wear and to receive wedding rings and other jewelry and watches, except that defendants may prohibit the wearing of a particular article of such jewelry if it is expensive or if there is a reasonable likelihood that it will be used as a weapon; provided that wedding rings and religious jewelry of a size and type

typically worn in civilian situations, including those made of gold, silver and small stones, shall not be prohibited.

D. LAUNDRY FACILITIES

1. By a date yet to be determined in accordance with the terms of paragraph EE, infra, defendants shall provide free laundry service sufficient to provide all detainees with a neat, clean change of clothing and a clean towel at least twice per week.

2. Until laundry service is provided as required by subparagraph 1, and thereafter, defendants shall permit detainees to wash and dry their own laundry in the housing areas.

E. RECEIPT OF PACKAGES

1. Defendants shall permit detainees to receive packages from and send packages to, any person.

2. Detainees shall be allowed to receive, through delivery by a visitor or any other person to the institution during visiting hours and any other hours agreed upon by the parties or deemed appropriate by defendants, packages containing clothing, publications or any other item which a detainee is currently permitted to receive: further, by a date yet to be determined in accordance with the terms of paragraph EE, infra, detainees shall be allowed to receive packages containing the above items and other additional items yet to be determined, through the above means of delivery as well as through the mail; provided that nothing herein shall be construed to limit detainees' existing rights to receive publications through the mail as provided in paragraph F, infra. Incoming packages may be opened and

inspected for contraband and shall be delivered to the recipient within 48 hours of receipt by the Department of Correction ("Department").

3. Detainees shall be allowed to send packages from the institution through the mail at their own expense, and by hand delivery to institutional personnel for pick-up by the addressee.

4. Nothing in this stipulation resolves the issues of the permissible contents or quantity of packages, and in the event that those issues cannot be resolved, they are reserved for determination by the Court.

F. POSSESSION AND RECEIPT OF PUBLICATIONS

1. Defendants shall permit all detainees to receive from any source any publications, including books (hard and soft cover), periodicals and other reading material. Such publications shall not be censored nor shall their delivery be delayed unless they contain specific instructions on the manufacture or use of dangerous weapons or explosives, or plans for escape.

2. Books, periodicals and other reading material may be hand delivered by a visitor or any other person to the institution at any time during the normal visiting hours and during any additional hours deemed appropriate by defendants; these publications also may be mailed to the institution. Defendants shall not require that any written or printed form accompany incoming publications in order for such publications to be delivered to the institution. Defendants shall deliver such publications to their intended recipients promptly and shall make their best efforts to do so within 24 hours of delivery of the publications to the institution.

3. Defendants shall keep posted in the visitors' waiting areas notices which inform visitors that they may mail or bring books, periodicals and other reading material to detainees and which inform them of the procedures for doing so.

G. CORRESPONDENCE

1. Defendants shall not open any detainee's incoming correspondence except in the presence of the intended recipient or pursuant to a lawful search warrant.

2. Defendants shall not maintain any records of correspondence received by any detainee, including sources or amounts of correspondence; except that nothing herein shall preclude defendants from maintaining, in a place separate from the detainee's institutional file and for the sole purpose of assuring efficient mail delivery, their own records of mail received; provided, however, that such records shall not be used in any way to affect any terms or conditions of a detainees' subsequent confinement nor shall they be released to any party other than the detainee except upon court order or subpoena issued by a governmental agency which, by law, is authorized to inspect Department of Correction records and then only after notice to the party affected, which notice in no event shall be less than 24 hours before the return date of the application for the court order or subpoena.

3. Defendants shall not read or censor any detainee's incoming or outgoing mail unless defendants are authorized to do so by a lawful search warrant.

4. Defendants shall forward mail received at the institution for a detainee who has been transferred to another institution or who has been released.

5. Both personal and legal mail shall be delivered by

defendants to detainees in punitive segregation, administrative segregation, and any other special status as promptly and with the same frequency as such mail is delivered to detainees in general population.

6. All procedures, guidelines and restrictions issued by defendants concerning the searching and censoring of mail received by detainees in general population as well as any changes in these procedures, guidelines and restrictions, also will apply to mail received by detainees in punitive segregation, administrative segregation, and any other special status.

7. Any detainee shall be permitted, on request, to send correspondence by certified mail, at his own expense; provided, however, that where the detainee is indigent and as a matter of law, rule or regulation such correspondence is required to be sent by certified mail, such expense shall be paid by the defendants.

H. CONFISCATION OF PROPERTY

1. Property taken on admission. Defendants shall log all property taken from detainees on admission to the institution and shall provide a method with which to identify and return such property. The procedure for identification of such property shall include provision of a receipt to the detainee describing the property seized and the circumstances under which and by whom it was taken.

2. Property taken at all other times. The procedure outlined in subparagraph 1 above shall apply when any detainee's property, other than controlled substances as defined in New York Penal Law §220.00, guns, knives, or other weapons, is taken by defendants at any time other than on admission.

3. Defendants shall devise a procedure by which a detainee may contest the taking of personal property and which shall provide the following:

a. a brief statement to the detainee setting forth the basis for the seizure

b. notice to the detainee of the right to respond in a reasonably simple and convenient manner, and to assert grounds, if any, on which the seizure is claimed to be unwarranted;

c. a suitable opportunity to contest evidence thought to warrant seizure;

d. if the seizure is upheld, a written statement of the reason for such decision.

4. No seized property shall be destroyed or otherwise disposed of so long as a detainee whose property has been seized remains at the institution and so long as the seized property is not lawfully turned over to another law enforcement agency for use in a criminal proceeding. Property which is other than controlled substances as defined in New York Penal Law §220.00, guns, knives, other weapons or perishable food, and which is not turned over to another law enforcement agency for use in a criminal proceeding, shall be stored by the institution unless or until the detainee requests that it be forwarded at his own expense to whomever he chooses. A detainee shall be permitted to return or forward, at his own expense, seized perishable food to however he chooses. When the detainee is released or transferred from the institution, any stored property shall be returned to him or transferred with him.

I. PROCEDURES FOR CELL SEARCHES

1. Detainees shall be permitted to observe all searches of

their cells, except that should a detainee attempt to disrupt the search of his cell or remove anything from his cell during the search, that detainee may be moved from the area of the search and the search may be continued without that detainee's presence.

2. Notwithstanding the requirements of subparagraph 1 above, individual cells to which detainees are or may be assigned may be searched, without the presence of the detainee, upon a showing a good cause approved in each instance in advance, in writing, by a captain or higher-ranking officer; provided, however, that in a case of imminent danger of bodily harm such a search may be performed without such authorization, in which event a written report explaining the reason for the search and the justification for conducting it without first obtaining authorization shall be made to a captain or higher-ranking officer as soon after the search as possible.

3. Defendants shall conduct routine searches of housing areas only at times when most detainees are present in those areas.

4. Each detainee whose cell has been searched outside his presence shall, at the time of any such search or as promptly thereafter as practical, be given written notice of the reason for conducting the search in his absence.

5. During any search of a detainee's cell, the detainee's property may be moved only to the extent necessary to facilitate the search. The detainee's property may not be otherwise disturbed, and, to the extent possible, at the termination of the search property must be returned to the same place and condition in which it was prior to the search.

J. LINENS and BEDDING

1. Defendants shall provide each detainee, upon admission, with an issue of linens and bedding, including but not limited to:

a. two sheets;
b. one towel;
c. one pillow;
d. one pillowcase;
e. one mattress with cover; and
f. sufficient blankets to provide comfort and warmth.

2. Defendants shall provide for all bedding items, prior to being issued, to be checked for damage, repaired, if necessary, and cleaned.

3. Defendants shall regularly provide detainees with clean linens and bedding in the following amounts and according to the following schedule or more often as necessary:

a. Two sheets and one pillowcase - once each week;
b. one towel - twice each week;
c. sufficient blankets to provide comfort and warmth - once every three months.

In addition, pillows and mattresses shall be cleaned once every six months or more often as necessary.

4. Defendants shall provide detainees with mattresses constructed of fire-retardant material and covered with material that is both water-resistant and easily sanitized.

5. Defendants shall provide for storage of all mattresses, bedding and towels in a safe and sanitary manner.

K. BODY CAVITY SEARCHES

Defendants shall not examine the genitals or anal cavity of any detainee, except that defendants may require a visual inspection of the genitals or anal cavity of a detainee either upon admission of the detainee to the institution or when a correction officer of the rank of captain or above has reasonable cause to believe that the detainee is concealing contraband in his genital or anal area. Such reasonable cause must be recorded in writing by that officer upon sworn statements of the underlying basis for the search, with a written record of the reasons, results and circumstances of each such search. A copy of such written record shall be given to the detainee, and a copy shall be maintained and preserved by the defendants. Any such examination shall be conducted in the most dignified and least obtrusive manner possible and in private by medical personnel, who shall be of the same gender as the detainee whenever possible. No one else shall be present at such examinations except those correctional personnel, of the same gender as the detainee, who are essential for security reasons. Notwithstanding the above, the parties agree that the provision of this paragraph of this stipulation and the subsequent judgment concerning who shall conduct any visual inspections shall not take effect until the resolution of discussions between the Department and medical personnel, such resolution to be achieved no later than six (6) weeks from the date of the signing of this stipulation; in the event that the Department and the medical personnel agree as to this provision, they shall so notify plaintiffs' counsel and the Court shall be notified that the provision shall be immediately implemented by defendants as provided above; in the event that the Department and the

medical personnel cannot agree as to this provision, then the issues of who shall conduct body cavity searches and who shall be present at such searches shall be resolved between the parties or shall be presented to the Court for determination in this case and on a city-wide basis.

L. COMMISSARY COSTS

1. Items for purchase at the HDM commissary shall be sold to detainees at cost. For purposes of this stipulation, cost shall be defined as the price paid by defendants for the items for purchase and all other expenses necessarily and directly incurred only in the course of the operation and management of the commissary.

2. Nothing in this agreement resolves the question of what items shall be available for purchase in the commissary or the amount of such items which detainees may purchase or the question of the schedule for detainee attendance at commissary.

M. DAYROOM ACCESS

Defendants shall permit every detainee who is not in punitive segregation to have access to a dayroom during all lock-out periods.

N. EATING OUTSIDE OF CELLS

Defendants shall permit all detainees, except those in punitive segregation, to eat all meals communally in dayrooms or similar areas suitable for dining designated by defendants. Detainees shall not be locked into dayrooms and shall be permitted to return to the lock-out corridor at any

time during the meal period; further, detainees shall be permitted to return to their cells during the meal period in accord with the institutional lock-in/lock-out schedule to be determined by the Court if not agreed upon by the parties.

O. ATTORNEY VISITING

1. Defendants shall permit attorneys to visit detainees at any time between the hours of 8 A.M. and 8 P.M. daily.

2. If an attorney arrives at HDM for a visit with a detainee while a count of detainees is in progress, defendants shall not be required to permit such visit until the count is completed.

3. Defendants shall permit attorneys to arrange such visits in advance by calling the Department or HDM to inquire as to whether a particular detainee will be available at a particular time and to leave a message informing that detainee of he time of the attorney's intended visit.

4. Defendants shall permit any attorney visiting a detainee at any institution on Rikers Island to go directly to any other institution on Rikers Island in order to visit another detainee without first returning to the bridge control building or any other central processing facility.

5. Nothing in this stipulation resolves the issue of obstacles to attorney access to institutions located on Rikers Island and in the event that issue cannot be resolved, it is reserved for determination by the Court.

P. INMATE COUNCIL PARTICIPATION BY SPECIAL STATUS DETAINEES

Detainees in all special status categories other than punitive segregation shall be represented on the institution's

Inmate Council in the same manner as are detainees in general population; detainees in each such special status category shall have one representative who shall be elected by and drawn from the category which he represents; provided, however, that defendants may prohibit the attendance of any detainee whose presence at the Inmate Council meeting is determined to constitute a threat to the safety and security of the institution; and provided further that detainees in any category comprised of fewer than five persons shall be permitted to select a representative from their own category, as provided above, or, at the option of defendants, to consult with and be represented by a council delegate not in that category but acceptable to a majority of the detainees in that category.

Any category comprised of five or more persons shall be represented by a person in that category, except that, in any exceptionally unusual instance where every inmate in a category is a person whose presence at the Inmate Council meeting is determined to constitute a threat to the safety and security of the institution, detainees in such category shall be permitted to consult with and be represented by a council delegate not in that category but acceptable to a majority of the detainees in that category.

Q. COMMUNAL RELIGIOUS SERVICES FOR SEGREGATED DETAINEES

1. Defendants shall permit any detainee confined in punitive segregation, administrative segregation or any other special status category to attend any religious services which detainees in general population may attend, except in the following circumstances: a detainee who has been found, in a procedure with adequate due process safeguards, to pose a

threat to the safety and security of the institution because of the likelihood that he will actively disrupt a particular religious service or services attended by the general population, may be denied permission to attend the service or services in question. Adequate due process safeguards shall include but not be limited to the following:

a. notice to the detainee, at least 48 hours prior to a particular religious service or services, that he has been determined to pose a threat to the safety and security of the institution because of the likelihood that he will actively disrupt such service or services; such notice shall include the reasons underlying such determination;

b. a suitable opportunity to be heard personally,by an impartial board or an officer of the rank of captain or above, in opposition to such determination;

c. in instances in which the determination is upheld, (i) a written decision, with a copy to the detainee, setting forth the basis for upholding the determination and specifying the length of time for which the detainee shall be denied permission to attend particular religious services; (ii) a weekly opportunity to request and receive reconsideration of the determination and to submit a statement in support of such reconsideration, and written notice to the detainee of the basis for any continuing denial of permission to attend the religious service or services in question; such reconsideration shall be by an impartial board or by the warden.

In an instance where the facts sufficient to support a denial of permission for a detainee to attend a religious

service are not known to correctional personnel 48 hours prior to that service, defendants shall afford the detainee the due process safeguards described in subparagraphs (a),(b), and (c) above within a shorter period prior to the religious service, or, at the option of the detainee, after the service but within 48 hours of the determination that the detainee poses a threat to the safety and security of the institution because of the likelihood that he will actively disrupt the service; provided that nothing in this stipulation shall be construed to require defendants to provide the due process safeguards described in subparagraphs (a),(b), and (c) prior to a service in situations where the facts sufficient to support a denial of permission for a detainee to attend a religious service are not known to correctional personnel more than 12 hours prior to that service.

2. Nothing in the procedures set forth in this section of this stipulation shall require disclosure of information that would reveal the identity of persons supplying, on a confidential basis, information to the defendants or other law enforcement agencies.

3. If any detainee is denied permission to attend a particular religious service or services attended by detainees in the general population, defendants shall provide that detainee with an opportunity to attend a similar communal religious service apart from the general population, but in a dayroom, or an equivalent area away from the lock-out corridors, which shall be equipped with appropriate furnishings and religious articles.

4. Under no circumstances shall any detainee in punitive segregation, administrative segregation or any other special status category be denied expeditious access, on request, to any religious adviser to whom detainees in the general population have access.

R. DUE PROCESS AND PROGRAMS FOR DETAINEES IN HIGH SECURITY CATEGORIES

l. Defendants shall accord the following due process safeguards to any detainee who is involuntarily placed in any of the most restrictive security categories, including those determined to be high security risks, escape risks or in need of protective custody:

a. Prior to or immediately upon placement in any of such categories, the detainee shall be given written notice of:

(i) the reasons for such security designation;

(ii) the evidence relied upon by the institution's administration for such security designation; and

(iii) the right to a hearing.

b. the written notice to the detainee shall inform him of the rights which he must be accorded at the hearing; such rights shall include but not be limited to the following:

(i) the opportunity to appear personally and to be fully informed of the evidence against him;

(ii) the opportunity to make a statement, to call witnesses, and to submit documentary evidence, subject to the hearing officer's rights to keep the hearing within reasonable limits;

(iii) the opportunity to confront and cross-examine witnesses whenever the hearing officer cannot rationally determine the facts without cross-examination; and

(iv) if the detainee is illiterate or if the complexity of the issues makes it unlikely that he otherwise

can collect and present the evidence necessary for an adequate presentation of his case, the right to the assistance of a counsel-substitute, or, at the option of the defendants, the assistance of retained counsel.

c. Unless the right to a hearing is waived by the detainee, such hearing shall be held between 24 and 48 hours after the detainee is given the notice required by subparagraph 1(a) above; or, if a holiday or weekend falls within the 24 to 48 hour period, then, at the option of the defendants, such hearing shall be held on the first business day after the notice required by subparagraph 1(a) above is given. In the event that the detainee waives his right to a hearing, he may request one at a later time, and following such a request, a hearing shall be held within the time period specified above.

d. The hearing officer shall keep notes adequate to reflect the content of the proceedings and to furnish a basis for his/her decision.

e. In the event that the hearing officer determines that the decision to place the detainee in one of the most restrictive security categories was justified, he/she shall set forth his/her reasons and findings to the warden within 24 hours of the conclusion of the hearing. Within 24 hours thereafter, the warden shall, in writing, with a copy to the detainee, approve or disapprove the hearing officer's decision.

f. In the event that the hearing officer determines that the decision to place the detainee in one of the most restrictive security categories was not

justified, the detainee shall immediately be transferred out of the restrictive security housing, and the Department shall expunge from detainee's records any and all references to his period of classification and housing in that security category. Nothing herein shall preclude defendants from maintaining, in a separate place and for internal and administrative purposes, their own records containing a brief reference to the location and period of the detainee's housing in such restrictive security category and to the alleged reasons for such housing, including the determination that such housing was not justified; provided, however, that such records shall not be released to any party, other than the detainee, or be used in any way to affect any terms or conditions of a detainee's subsequent confinement.

g. For the purpose of subparagraph 1 of this section shall refer either to a disinterested person, appointed by the warden, who shall have taken no part in the determination to place the detainee in any of the most restrictive security categories, or to the institution's classification's board, which shall not, prior to the hearing provided for in this stipulation, have taken any part in the determination of the detainee's security status or housing assignment.

h. The status of any detainee held in any of the most restrictive security categories shall be reviewed by the warden or by a classification board at intervals not to exceed 4 weeks, for the purpose of determining whether any change of circumstance

warrants releasing him from such status; and the detainee shall be notified of the results of the review.

i. With respect to those detainees currently housed in any of the most restrictive security categories, the Department shall take steps to implement the hearing process forthwith. All such detainees shall be provided with the notice and hearings required by subparagraphs (a) and (b) above within one week of the entry of the judgment incorporating the terms of this stipulation.

j. Nothing in the procedure set forth in this section of this stipulation shall require disclosure of information that would reveal the identity of persons supplying, on a confidential basis, information to the defendants or other law enforcement agencies.

k. The punishment for similar institutional infractions may not be harsher for detainees in any of the most restrictive categories than for other detainees simply because the former are in such security categories.

2. Detainees who have been voluntarily or involuntarily placed in any of the most restrictive security categories, including those determined to be high security risks, escape risks or in need of protective custody, and detainees under mental observation, shall:

a. be permitted to attend all "special shows" unless defendants make a good faith finding that the level of tension in the institution is such that their attendance at a particular show would endanger the safety and security of the institution;

b. be permitted to watch all movies which the

general population is shown; restrictive security category detainees, however, may be shown movies in a separate location and in groups comprised only of persons similarly classified;

c. receive the same amount and type of indoor and outdoor recreation as is afforded detainees in the general institutional population;

d. have the same access to social service programs, counseling and mental health services as detainees in general population; such services may be provided in an area designated by defendants;

e. have access to publicly funded classes and programs, such as reading skills, music and art, which are reasonably similar to those classes and programs which are provided to detainees in general population; for purposes of this provision, reasonably similar classes and programs shall mean classes and programs equivalent in variety, structure, character, value and purpose; these classes and programs may be provided in a separate location and in groups comprised only of persons similarly classified.

3. Defendants shall use their best efforts in good faith to make available to detainees in the most restrictive security categories all private volunteer programs which operate within the institution. Whenever such programs are not available to detainees in any of the most restrictive security categories, defendants shall promptly submit a written report to plaintiffs' counsel setting forth what efforts have been made and the reasons why they have been unsuccessful.

4. Nothing in this provision of the stipulation shall be construed to preclude defendants from providing a detainee under mental observation, if a psychiatrist treating that

detainee so directs, with appropriate programs different from those provided to detainees in the general population.

5. The number and quality of resources devoted to programs currently or hereafter in effect in the institution shall not be diminished for any reason related to defendants' obligation to comply with the terms of this agreement.

6. This paragraph of this stipulation does not resolve the following issues: the number and quality of programs which defendants are to maintain at the institution; access to the general and law libraries and the commissary; and the due process and activities to which detainees in categories of segregated confinement other than those specified in subparagraphs 1 and 2 above are entitled.

S. ENVIRONMENTAL HEALTH

1. Defendants shall maintain the institution in a condition which is clean, healthful, safe, free of vermin and insect infestation and which satisfies all applicable health laws and regulations. By January 1, 1979, defendants shall make a comprehensive inspection and evaluation of all environmental conditions at HDM and prepare and make available to plaintiffs' counsel a detailed plan for maintaining the environmental quality of the institution as required by this stipulation and a detailed plan for correcting any existing deficiencies, including all of those cited by the Department of Health, as promptly as possible and, in any event, by December 1, 1979.

2. Defendants shall assign a person at the executive staff level of the Department to oversee the establishment and maintenance of environmental conditions, at HDM and all other institutions maintained by defendants, in compliance with the terms of this stipulation. Under the direct

supervision of such person, defendants shall also assign at HDM a person, who shall be either a civilian or a correction officer of the rank of captain or above (who shall for purposes of this stipulation be referred to as an "environmental health officer") and who shall have direct responsibility for maintaining environmental conditions in compliance with the terms of this stipulation throughout HDM and shall be provided with adequate staff and supplies to carry out that responsibility. The environmental health officer shall have had or shall receive appropriate training and experience in environmental health and maintenance. The environmental health officer shall make a thorough inspection of the entire institution in the course of each week and shall make more frequent inspections when necessary to respond to particular problems. The environmental health officer shall submit, to the warden and to the person on the executive level responsible for environmental health and maintenance, reports of all such inspections, including a description of any ameliorative actions taken, planned or recommended. The records shall be preserved and made available to plaintiffs' counsel at their request.

3. The Department of Health of the City of New York shall thoroughly inspect HDM at least once every month and at more frequent intervals when necessary to monitor the correction of particular conditions in the institution. Copies of all reports of these inspections shall be forwarded to the warden, to the person on the executive staff level of the department responsible for environmental health and maintenance and the environmental health officer at the institution, and shall be available, upon request, to plaintiffs' counsel.

Housekeeping

4. Defendants shall provide for the following:

a. Shower facilities, janitors' closets, laundry areas, and toilets, washbasins, sinks and other personal hygiene and sanitation facilities in common areas throughout the institution, shall be thoroughly cleaned and sanitized at least once daily and more often if necessary.

b. All floors in common areas throughout the institution shall be swept and washed daily and kept dry and free of hazardous material; all floors in common areas of the housing blocks shall be swept and washed three times a day.

c. Each entire housing block and every common area in the institution shall be thoroughly cleaned by washing at regular, frequent intervals, and in no event, less frequently than once every two weeks. All surfaces, including bars and windows, shall be cleaned and washed regularly, and in no event, less frequently than once every three months.

d. Every cell shall be thoroughly cleaned and sanitized upon becoming vacant and shall be maintained in that condition until it is again occupied.

e. All surfaces shall be well maintained and provision shall be made for repair of scaling paint, broken or loose plaster or other deterioration.

f. Receptacles for ashes shall be provided throughout the institution, including all common areas, and apart from containers of other refuse; the ash receptacles shall be emptied and cleaned

daily.

g. Each housing area shall have a well-ventilated janitor closet equipped with a sink and an adequate supply of cleaning implements and supplies, accessible to all detainees. Such implements and supplies shall include brooms, dust pans, mops, mop wringers, buckets, sponges, toilet and other brushes, soap, disinfectant, and other cleaning agents. All such supplies shall be available in sufficient number and quantity so that each detainee can clean his cell daily and so that the common areas of the housing blocks can be cleaned according to the terms of this stipulation; supplies shall be replaced promptly when needed.

h. All cleaning implements shall be cleaned thoroughly after each use and stored in a clean, well-ventilated place.

Refuse

5. Defendants shall provide for the removal, in a safe and sanitary manner, of all refuse in the institution. Except as specifically provided elsewhere in this stipulation with regard to sanitation in food storage, preparation and service areas, all refuse shall be removed at least daily, immediately after night-time lock-in begins, and whenever a refuse container is full or whenever removal is otherwise necessary to maintain sanitary conditions.

6. Defendants shall provide and maintain a sufficient number of refuse containers throughout the institution, including containers distributed in each housing area, tier, lock-out corridor, dayroom and every other common area. All containers used to store, transport or dispose of refuse shall be:

a. durable, non-porous, water-tight, rust-resistant, inaccessible to insects and vermin, easily cleanable and fitted with fly-tight covers; and

b. thoroughly cleaned and dried, after being emptied, and in areas apart from food storage; preparation and service facilities and facilities used in laundry.

Vermin and Insect Control

7. Defendants shall take all necessary measures, consistent with detainees' health and safety, to eliminate vermin and insect infestation within the institution and on the grounds adjacent thereto. For the purpose of this stipulation, infestation shall not be considered to mean the random or occasional presence of an insubstantial number of vermin and insects.

8. Defendants shall retain the full-time services of qualified professional exterminators who, in coordination with the environmental health officer, and with the assistance of all necessary and properly trained correctional and/or civilian personnel, shall:

a. conduct continuous inspections for the detection of any evidence of vermin and insects anywhere within the institution or on the grounds adjacent to the institution; and shall canvass inmates to determine any particular problems of infestation noted by them;

b. at the first indication of the presence of vermin or insects, take appropriate measures to eradicate these vermin or insects and shall continue appropriate measures until they are eradicated;

c. report in writing to the warden the results of such

inspections and all measures taken to prevent or eradicate vermin and insect infestation; such reports shall be available to plaintiffs' counsel upon request;

d. take proper precautions in the use of all insecticides, rodenticides, traps and other materials for the control of vermin and insects, to prevent food contamination, fire hazard or injury or illness to inmates.

9. Defendants shall take all necessary steps, including those listed below, to eliminate all vermin and insect breeding and nesting areas inside and adjacent to the institution and to close vermin and insect entryways into the institution.

a. Throughout the institution, all openings, cracks, and holes in the walls, floors, doors, and around pipes and conduits shall be properly sealed and/or closed. Leaky pipes shall be repaired.

b. All openings to the outside shall be effectively protected against the entry of vermin and insects. Close fitting screens that are fly and mosquito tight and free of breaks shall be provided and maintained on all windows during the seasons when flies and mosquitoes prevail in any area infested by flies or mosquitoes.

c. Each inmate shall be provided with a suitable food storage cabinet or container, with tight-fitting drawers or cover, in his cell.

Plumbing

10. Defendants shall maintain the plumbing system throughout the institution in a sanitary and serviceable condition.

a. The plumbing system throughout the institution shall be inspected at regular, frequent intervals in order to detect the presence of any defects, sanitary or otherwise, leaks and clogging; maintenance shall be prompt, and dated records shall be kept of any malfunctions, both reported or discovered upon inspection, and of all remedial measures taken, and such records shall be provided, upon request, to plaintiffs' counsel.

b. Plumbing complaints from inmates shall be investigated immediately upon receipt; repairs shall be made promptly; no inmate shall be locked even temporarily in a cell which lacks a properly functioning sink or toilet.

c. All plumbing fixtures throughout the institution shall be made of durable, rust-resistant, smooth, non-absorbent materials, and shall be free from concealed fouling spaces; all plumbing fixtures shall be trapped.

d. All shower areas shall be constructed as to provide proper drainage, and all drains shall be cleaned daily in order to prevent clogging and defective drainage.

Food Preparation, Service and Storage Areas

ll. The environmental health officer at HDM shall, in coordination with the food services manager at the institution, inspect daily all food program facilities and equipment and maintain a written description of all daily inspections, including remedial action taken in order to assure the following:

a. The institution is in compliance with all environmental health requirements provided for

elsewhere in this stipulation with regard to food services, and all deficiencies and malfunctions are reported and corrected promptly.

b. Any failure to meet relevant health standards shall be remedied immediately.

c. Food storage, preparation, and service facilities, including floors, walls and ceilings, and equipment within such facilities, shall be kept well-maintained, sanitary and free of dirt, dust, vermin, insects, grease, food waste and other contamination.

d. In the food storage, preparation, and service areas, including all dayrooms and dining areas where food is served, refuse shall be collected and removed in a safe and sanitary manner, according to the requirements of subparagraph 6 of this provision of this stipulation, after each meal and more often if necessary to maintain sanitary conditions.

e. All cleaning procedures shall be conducted in a manner which prevents food contamination.

f. All food service, preparation and service areas shall have proper drainage.

g. All surfaces to which food or drink are exposed shall be kept clean and in good repair, free from breaks, corrosion, open seams, cracks or chipped places.

h. After each use, all kitchenware, utensils, food-contact surfaces, and equipment which is used in the preparation, serving, display, or storage of food, shall be thoroughly cleaned.

i. All multi-use eating and drinking utensils shall be thoroughly cleansed, rinsed, and sanitized in dish-

washing machines at appropriate temperatures, after each use.

j. No articles, polish, or other substance containing any poisonous material shall be used for cleaning or polishing utensils. Poisonous materials shall not be used in any way so as to contaminate working surfaces, food, equipment, or utensils, or to constitute a hazard to inmates.

k. Sufficient ventilation shall be provided so that all food storage, preparation and service areas are kept free from excessive heat, steam, condensation, vapors, smoke or fumes. Grease or condensate shall be prevented from dripping into food or onto food preparation surfaces.

l. Toilets and washrooms with fly-tight partitions and doors shall be sufficient in number and conveniently located for use of inmates or others assigned to any work involving the handling of foods.

m. Hot and cold running water under pressure, and adequate supplies of soap and sanitary towels, shall be provided, and hand-washing signs shall be posted, in each washroom. Basins, taps, and dispensers shall be in good repair.

n. Food supplies shall be stored on clean surfaces, protected from dust, dirt, splash, or other contamination, and resting at least six inches above the floor.

o. Food handlers shall not use tobacco in any form while engaged in food preparation or service, or while engaged in equipment and utensil washing, except in designated locations for smoking where no contamination hazards will result. The

garments of all food handlers must be clean and sanitized; aprons or uniforms and hairnets shall be worn by all food handlers. Food handlers shall maintain a high degree of personal cleanliness and conform to good hygiene practices during all working periods.

12. All individuals, correctional, inmate or civilian, employed to carry out any responsibilities for environmental health and maintenance in the institution shall perform such functions under the direct supervision of properly trained personnel.

13. Nothing in this stipulation resolves the issues of heat and ventilation, and in the event that those issues cannot be resolved, they are reserved for determination by the Court.

T. PERSONAL HYGIENE

1. On admission to the institution, each detainee shall be provided, at Department of Correction expense, with an issue of personal hygiene items, including but not limited to:

a. soap;
b. toothbrush;
c. toothpaste or tooth powder;
d. drinking cup;
e. toilet paper;
f. towel;
g. mirror, unless this is permanently available in each detainee's cell; and
h. a comb.

2. All personal hygiene items issued pursuant to subparagraph 1 shall be replenished or replaced, as needed, by defendants at Department expense.

3. The Department shall provide a procedure by which

each detainee will be able to shave daily with sanitary and properly maintained equipment, including depilatories where requested.

4. Defendants shall permit each detainee to shower each day in shower facilities providing sufficient water at appropriate temperatures, and shall permit detainees scheduled for a court appearance to shower and shave on the day of and at a time prior to the appearance.

5. Defendants shall employ in HDM the services of at least one full-time licensed barber or hair-stylist and a sufficient number of other persons trained in hair-cutting and working under the supervision of a licensed barber or hair-stylist so that each detainee may have his hair cut and styled within five days of his admission to HDM and thereafter regularly as needed by the detainee. Defendants shall permit each detainee to have his hair cut in whatever style that detainee chooses.

6. Defendants shall provide adequate supplies of properly functioning equipment in order to comply with the foregoing provisions and shall maintain such equipment in a safe, sanitary condition as required by applicable laws and regulations.

U. PUNITIVE SEGREGATION

1. Defendants shall provide each detainee in punitive segregation with at least the following:

a. access to showers, laundry services, medical care, the law library, and visiting, in the same amount and frequency, and under the same conditions, as that provided to the general population; and

b. the same amount and frequency of access to those personal hygiene articles and services specified in

paragraph T of this stipulation. In addition, deodorant may be brought by detainees with them to punitive segregation and may be purchased as needed from the commissary by detainees during the period of their punishment.

2. Defendants shall permit each detainee in punitive segregation to possess and receive reading material, in the same amount and frequency and under the same conditions as that provided to the general population, from any source other than another inmate, including reading material on a regular basis from the HDM general library.

3. Nothing in this stipulation resolves the issues of (a) the amount of personal property detainees in punitive segregation shall be permitted to possess except as provided in subparagraphs 1 and 2 above, (b) the amount and nature of commissary items which detainees in punitive segregation shall be permitted to purchase and the frequency with which purchases shall be permitted, except as provided by subparagraphs 1 and 2 above, (c) the amount of telephone access which shall be permitted to detainees in punitive segregation, and (d) the amount and frequency of outdoor and indoor recreation which shall be provided to detainees in punitive segregation. This stipulation also does not resolve whether it is constitutionally permissible to impose punitive segregation upon members of the plaintiff class and, if so, the permissible duration of such punishment. The parties reserve the right to litigate these issues.

V. FOOD SERVICES

Nutrition and Menu Planning

1. Defendants shall provide each detainee with three meals per day which meet or exceed, on a daily basis, the

standards stated in the Recommended Daily Dietary Allowances (RDA) of the Food and Nutrition Board, National Academy of Sciences and the United States Department of Agriculture's Daily Food Guide, including the following adjustments:

a. appropriate adjustments for age and sex and for those determined to have been suffering from nutritional deficiencies;

b. supplementation, as required by the Daily Food Guide, for energy and calories.

2. Defendants shall provide all detainees with salads or raw vegetables daily and with fresh fruit at least once each week, and by January 1, 1979, fresh fruit shall be provided twice a week.

3. Defendants shall provide all detainees, at each meal, with the choice of a hot or cold beverage.

For at least the breakfast meal, defendants shall provide coffee as a hot beverage; tea bags shall also be provided. Neither coffee, tea nor milk shall be pre-sweetened; however, sugar shall be available for individual use.

Defendants shall equip each housing area with a mechanism which provides hot water, which shall be available to all detainees during meal periods and between meals for, among other purposes, preparation of their own beverages. In addition, the commissary shall be stocked with instant coffee, tea and hot chocolate available for purchase by detainees.

4. Defendants shall have all menus planned by a trained and certified nutritionist. Such menus shall:

a. be planned in advance, dated and posted for detainees' information;

b. respond to the ethnic, religious and social needs and tastes of the detainee population;

c. provide food variety and avoid frequent repetition of particular menu items; at each meal food shall be varied in color, texture and flavor;

d. take advantage of the seasonal availability of different foods and respond to the seasonal preference for different foods.

5. Substitutions in planned menus shall be made only by or with the approval of a trained nutritionist, and such substitutions shall be equal in nutritional value to the items replaced.

6. Defendants shall provide therapeutic diets to every detainee who has been prescribed such a diet by the physician. Such diets shall conform as closely as possible to the food served other detainees, shall be prepared in the institutional kitchen, and shall be provided in the regular food service facilities, unless a detainee requiring a therapeutic diet otherwise requires special housing in a medical facility; provided, however, that nothing in this subparagraph shall prevent defendants from assigning a detainee requiring a therapeutic diet to a particular housing area in the facility so long as that assignment does not affect the detainee's security classification, program opportunities or any other terms or conditions of his confinement.

7. Defendants shall provide special diets to those detainees whose religious beliefs require their adherence to dietary rules. If, for religious reasons, a detainee does not eat particular foods, he shall be provided with substitutes of comparable nutritional value.

8. Defendants shall never withhold food nor vary the standard menu as a disciplinary sanction or as a reward for good behavior.

9. Defendants shall maintain written records of all meals actually served to detainees, published menus and

substitutions in planned menus. Plaintiffs' counsel shall be allowed access to such records on request.

Food Preparation and Service

10. Defendants shall provide every detainee with food which is properly prepared so as to preserve vitamins, minerals, and nutrients and which is palatable in terms of color, flavor, texture and aroma. Defendants shall:

a. utilize standardized recipes in the preparation of all meals;

b. store, cook, serve and maintain food under sanitary conditions and at appropriate temperatures. Food shall be served expeditiously after preparation, and where food transportation is necessary, it shall be accomplished in carriers which have functioning heating and cooling mechanisms which maintain cold foods at below 40 degrees F. and hot foods at above 140 degrees F.;

c. provide adequate quantities of appropriate condiments, such as salt, pepper, ketchup and mustard, for individual detainee use at each meal.

11. Defendants shall provide all meals on schedule and at times which parallel the hours at which meals are generally eaten in civilian life. In no event shall the last meal of the day be served before 4:30 p.m.

12. Defendants shall provide at every meal sufficient and equitable quantities of all foods to each detainee, without the need to send for additional quantities of food before each detainee is fully served.

13. Defendants shall provide each detainee at every meal with sufficient quantities of appropriate eating utensils, glasses, cups and non-metal dishes and trays, at the time the

food is ready to be served. The above items shall be clean, sanitized in dish-washing machines at appropriate temperatures, and made of material which produces a minimal amount of noise.

14. Defendants shall provide and maintain sanitary dining areas which are designed to provide comfortable communal eating. Seating shall be available for all detainees.

15. Defendants shall provide to detainees returning or admitted to the institution after the last regularly scheduled meal has been completed, the same meal as was provided to all other detainees. Such meals shall be served at appropriate temperatures.

16. Personnel, both at the departmental level and at the institution, who are responsible for menu planning, food preparation and service, shall be kept regularly apprised of the quality of food service in the institution by at least the following means;

a. regular canvassing of detainees to obtain their reactions to the food services program;

b. a procedure by which detainees can make known daily, to those responsible for food services, including specified personnel in the Commissioner's office, their complaints regarding food services, and by which supervisory personnel will respond regularly to detainee complaints;

c. personal observation, sampling and evaluation, on a regular basis, of meals served to detainees; and

d. plate waste studies on a regular basis.

Records of evaluations by all of the above methods shall be maintained in writing and shall include, among other things, all studies and evaluation reports, as well as detainee concerns and actions taken in response to those concerns.

Plaintiffs' counsel shall be allowed access to such records on request.

Food Services Personnel

17. Defendants shall have all food which is served to detainees prepared in each institution under the direct supervision of a trained nutritionist or dietitian and a professional food services manager who is employed within the institution. The trained nutritionist or dietitian shall be employed in the institution within eight months of the date of the signing of this stipulation. The food services manager shall have had experience and training in institutional or commercial food preparation, management and service, including training in the prevention of bacteriological contamination and in the safe and sanitary use of kitchen equipment, and knowledge of city and state health standards.

18. Defendants shall employ a sufficient number of paid, skilled cooks in each institution.

19. Defendants shall employ detainees who are adequately trained in food preparation to assist in the preparation of food. However, such detainees shall not serve as substitutes for professional staff.

20. Defendants shall have all meals distributed and served to detainees under the direct supervision of non-inmate personnel, trained in food services.

21. Defendants shall assure that all food services personnel, including detainees, comply with applicable health laws and regulations, and that each day such personnel are clean and free of illness and infection.

22. Defendants shall provide all food services personnel with an orientation program and adequate structured training in the safe and sanitary handling of food and of equipment

for preparation and storage of food, in food preparation techniques, in personal hygiene, and in the responsibilities of the position the employee will hold.

23. Defendants shall provide all food services personnel with written work descriptions, in addition to oral instructions as to their responsibilities.

24. Nothing in this stipulation resolves the issues of excessive noise levels in the dining areas and the location of meals served to detainees returning or admitted to the institution after the last regularly scheduled meal has been completed. In the event that these issues cannot be resolved, they are reserved for determination by the Court.

W. MOVEMENT

By January 1, 1980, on the basis of a rational system which classifies detainees individually, detainees shall be permitted to travel unescorted between housing areas and activity locations, except where, on the basis of that system, designated detainees are required to be escorted between designated locations.

X. SIGNIFICANT FAMILY EVENTS

1. Except where the Commissioner or his designee has determined that a particular detainee's attendance at any of the following events presents a reasonable likelihood of escape or serious danger of bodily harm, and subject to such reasonable rules and regulations as the Commissioner may prescribe respecting the duration of absence from the institution, custody, transportation, care of the detainee and security, defendants shall, upon the occurrence of at least the events described below, permit all detainees the following:

a. Death

Each detainee shall be permitted to attend the funeral in New York City or the viewing in New York City of deceased parents, parents-in-law, grandparents, brothers, sisters, guardians and former guardians, children, grandchildren, children-in-law, spouses, including "common-law" spouses, and in the Commissioner's or his designee's discretion, other people with whom the detainee has had significant relationships; for purposes of this stipulation, the relationship of "common-law" spouse may be demonstrated, among other means, by either residence at the same address, existence of children in common or history of visiting within the institution. The Commissioner shall consider the detainee's preference between attending the funeral or the viewing but reserves the right to make a final decision, provided that the decision shall not be arbitrarily made and shall be based on legitimate security concerns.

b. Serious Illness

Each detainee shall be allowed to visit with any of the individuals listed above, in subparagraph 1a, when there exists a substantial likelihood of death as a result of an illness or accident.

c. Weddings

i. Each detainee shall be permitted to marry while incarcerated. Such services shall be conducted by any person, of the couple's choice, qualified to perform marriages in the State of New York.

ii. Upon one week's notice, a chapel or other appropriate space shall be made available for the

detainee's wedding service.

iii. Defendants shall make whatever provisions are necessary in order for the detainee to obtain the required blood tests and marriage license if the detainee so requests.

2. Attendance at the events described in subparagraph 1 above shall be permitted for a reasonable duration of not less than one hour, except where, in the case of serious illness, the length of the visit is limited by the treating physician or the rules of the hospital and shall be subject only to necessary security precautions. Such precautions shall be as minimally intrusive as possible, and defendants shall not handcuff detainees during their attendance at these events, except when, based upon the particular circumstances, there is a specific determination that security considerations require that a particular detainee be handcuffed at these events.

3. Defendants shall be allowed a reasonable amount of time, not to exceed 48 hours, in order to arrange attendance at any of the events described in subparagraphs 1(a) and (b) above and, unless the Commissioner or his designee has determined, according to the requirements of subparagraph 1 above, that the detainee's attendance at a particular event presents a reasonable likelihood of escape or serious danger of bodily harm, the defendants shall produce the detainee at the event. Defendants shall expedite the process in circumstances where it is apparent that the event will occur before 48 hours and in such circumstances, if the request is made at least 24 hours prior to the event, shall complete the process by that time unless in a rare instance, despite every attempt to do so, it is impossible for defendants to complete the process on time. Where the Department wishes to confirm the existence of an event, it may do so by any means, provided that such method is as minimally intrusive as

possible and is considerate of the privacy of the detainee and his family. Where the Department requires confirmation of the event by the detainee or his family, it shall be sufficient for the event to be confirmed by telephone or other oral means.

4. Nothing herein is intended to preclude any detainee from seeking a state court order requiring, on such terms as the court may direct, the defendants to transport him to these or other family events.

5. Nothing herein shall preclude defendants, if they so desire, from seeking a state court order facilitating the meeting of their obligations under this provision of the stipulation, provided that defendants' obligations and plaintiffs' rights as set forth in this provision shall in no way be diminished by defendants' seeking or obtaining such an order.

6. Nothing herein shall be construed as addressing the question of visits by detainees with their new-born children and the child's mother outside the institution. The parties reserve the right to litigate this issue.

Y. HOUSING FOR HOMOSEXUALS, TRANSVESTITES AND TRANSSEXUALS

1. Defendants shall house any detainee who is a homosexual, transvestite or transsexual, and who requests to be housed apart from the general population, in a special housing unit (hereinafter "separate homosexual housing") set aside solely for those detainees; provided, however, that defendants may, in accordance with the provisions of subparagraph 2, place such a detainee in a restrictive or specialized classification where appropriate and for reasons unrelated to his status as a homosexual, transvestite or

transsexual.

2. Defendants shall not deny to any detainee, or remove any detainee from, separate homosexual housing except where, in accordance with the due process safeguards provided in subparagraph 4 of this provision, a finding has been made at an individual is neither a homosexual, transvestite or transsexual; provided, however, that where appropriate, and in accordance with due process safeguards applicable to the general population, defendants may involuntarily place a homosexual, transvestite, or transsexual detainee in restrictive or specialized housing units which shall be safe and secure and which shall provide conditions of confinement no more restrictive than those imposed upon general population detainees in those units or categories. The sole fact of a detainee's appearance or physical mannerisms shall not be adequate justification for denying or removing a detainee from separate homosexual housing.

3. Defendants shall not place a detainee involuntarily in separate homosexual housing unless, in accordance with the due process safeguards of subparagraph 4 below there is a determination, based upon substantial evidence, that there is a reasonable likelihood that the detainee's presence in general population will pose a serious threat to the detainee's safety or to the safety and security of the institution. The fact that a detainee is a homosexual or transvestite shall not of itself constitute substantial evidence or adequate justification, nor shall a detainee's appearance or physical mannerisms alone be adequate justification for involuntarily placing a detainee in separate homosexual housing.

4. Prior to or immediately upon placing a detainee involuntarily in separate homosexual housing or removing a detainee from or denying separate homosexual housing to a detainee who requests it, defendants shall:

a. Provide the detainee with written notice of:

(i) the reasons for such housing assignment or its denial;

(ii) the evidence relied upon by the institution for its decision; and

(iii) the right to challenge the decision at a hearing before the institutional classification board of which at least one member shall be a psychologist, trained social worker or psychiatrist. Unless the right to a hearing is waived y the detainee, such hearing shall be held between 24 and 48 hours after the detainee is given the notice required by this provision, or, if a holiday or weekend falls within the 24 to 48 hour period, then, at the option of the defendants, such hearing shall be held on the first business day after notice has been provided. In the event that a detainee involuntarily placed in separate homosexual housing waives his right to a hearing, he may request one at a later time, and, following such a request, a hearing shall be held within the time period specified above.

b. At the request of a detainee who has been removed from or denied separate homosexual housing, defendants shall provide protective housing to that detainee at least until a post-hearing finding has been made.

c. At the hearing before the institutional classification board, the detainee shall have the right to appear personally and to make a statement; to call witnesses and submit documentary evidence, subject to the hearing board's right to keep the hearing within reasonable

limits; and the opportunity to confront and cross-examine witnesses whenever the hearing board cannot rationally determine the facts without cross-examination. If the detainee is illiterate or if the complexity of the issues makes it unlikely that he otherwise can collect and present the evidence necessary for an adequate presentation of his case, he shall have the right to the assistance of counsel-substitute or, at the option of the defendants, the assistance of retained counsel.

d. The hearing board shall keep notes adequate to reflect the content of the proceedings and to furnish a basis for its decision.

e. In the event that the hearing board determines that the decision to provide or deny separate homosexual housing was justified, it shall set forth its reasons and findings of fact in writing and submit such reasons and findings to the warden within twenty-four hours of the conclusion of the hearing. Within twenty-four hours thereafter, the warden shall, in writing, with a copy to the detainee, approve or disapprove the hearing board's decision.

f. In the event that the hearing board determines that the decision to impose separate homosexual housing was not justified, the detainee shall immediately be transferred to an appropriate housing area and, if the decision to impose involuntary homosexual housing is reversed, the Department shall expunge from the detainee's records any and all references to his period of classification and housing in that area. Nothing

herein shall preclude defendants from maintaining in a separate place, for internal and administrative purposes, their own records containing a brief reference to the location and period of the detainee's separate housing, and to the alleged reasons for such housing as well as the determination that such housing was unjustified; provided, however, that such records shall not be released to any other party, except the detainee himself, or be used in any way to affect any terms or conditions of a detainee's subsequent confinement.

g. Nothing in the procedure set forth in this section of this stipulation shall require disclosure of information that would reveal the identity of persons supplying, on a confidential basis, information to the defendants or other law enforcement agencies.

h. Any detainee shall have the right to have his classification and housing placement reconsidered in accord with the provisions of subparagraph 1-4 above, at any time based on a change of circumstances.

5. a. Defendants shall provide each detainee in separate homosexual housing with the same services, recreation, program not provided in groups, religious services and conditions of confinement, including visiting rights, as those provided to detainees in the general population; however, detainees in separate homosexual housing may be denied religious services with the general population only for the reason specified in paragraph Q, supra, and, in such event alternate

religious services shall be provided a set for the in paragraph Q. Recreation and movies shall be provided in groups comprised solely of detainees from homosexual housing.

b. Defendants shall, on the basis of individual determinations based on legitimate security grounds, allow detainees in separate homosexual housing to attend the same classroom, educational and other group programs attended by general population detainees or to attend reasonably similar classroom, educational and other programs in groups comprised solely of detainees in separate homosexual housing. Detainees in separate homosexual housing shall also be provided with the same or reasonably similar employment opportunities as those available to detainees in the general population. For purposes of this provision, reasonably similar programs and employment opportunities shall mean programs and employment opportunities equivalent in variety, structure, character, value and purpose.

c. Conditions of confinement, services, recreation, religious services, and all programs, whether or not provided separately for homosexual, transvestite, and transsexual detainees, shall be furnished to all detainees, regardless of sexual preference or orientation or personal mannerisms, under conditions which assure their safety and security.

6. Nothing in this stipulation resolves plaintiffs' claims, in the related case of Flowers v. Malcolm, 76 Civ.2182 (S.D.N.Y), for damages arising out of transfers and housing assignments in May, 1976. In the event that these claims

cannot be resolved by the parties, plaintiffs reserve the right to litigate them.

Z. ACCESS TO NEWSPAPERS

1. Defendants shall provide all detainees with adequate access every day to local newspapers, including Spanish-language newspapers, which are normally read by groups represented in the detainee population. Access to these newspapers shall be provided in the following manner:

a. Defendants shall continue to furnish one copy of at least one of the three major daily New York City newspapers and at least one copy of the major New York City Spanish-language newspapers to each group of thirty or fewer detainees on the day of publication. Copies of each of the major New York City English and Spanish-language newspapers shall also be provided on the day of publication to the institutional library for use by detainees.

b. Defendants shall use their best efforts to obtain additional day of publication and day old copies of the major New York City English and Spanish-language newspapers which shall be provided to every dayroom in quantities which assure a reasonable likelihood of access by all detainees; and

c. Sufficient numbers of each of New York City's major English and Spanish-language newspapers shall be made available on the day of publication for daily purchase, in the commissary by detainees scheduled to go to commissary, or in the housing areas.

2. The parties agree to continue negotiations, for thirty days following the signing of this stipulation, for the establishment of a system which, in addition to the provisions for newspaper access agreed upon above, will permit all detainees to purchase day of publication newspapers daily. In the event that the parties reach agreement, they shall sign a supplemental stipulation of settlement. If after thirty days the parties are unable to reach agreement, nothing in this stipulation shall be construed to resolve the issue of whether all detainees are entitled to purchase day of publication newspapers daily and, in such event, plaintiffs reserve the right to litigate the issue.

AA. LAW LIBRARY

1. Defendants shall maintain a properly equipped law library which shall include, among other items:

a. necessary research and reference materials which shall be kept properly updated and supplemented, and shall be replaced without undue delay when any materials are missing or damaged;

b. unmarked legal forms which are commonly used by detainees and copies of which all detainees shall be permitted to use or which they shall be permitted to photocopy for their own use;

c. a photocopy machine available for the free copying of all legal materials;

d. a sufficient number of typewriters in working order which can be used by detainees as well as by trained typists;

e. an adequate supply of legal-size paper.

2. Defendants shall staff the law library with an adequate number of trained legal assistants, some of whom

speak Spanish, and with typists, available to assist detainees with the preparation of legal materials.

3. Defendants shall maintain the law library sufficiently free of noise and activity and with sufficient space and lighting to permit sustained research.

4. By a date yet to be determined in accord with the provisions of paragraph EE, infra, defendants shall keep the law library open for detainee use at least eight hours per day during lock-out periods, seven days a week, including at least three hours between 6 p.m. and 10 p.m. on weekday evenings. Defendants shall allow each detainee to have access to the law library for a period of at least two hours per day, seven days a week, and shall allow greater access if a detainee has an immediate need for additional time, such as an impending court deadline; provided, however, that if on a particular day, with maximum use of the law library, defendants must deny access to certain detainees because there is insufficient space to accommodate all detainees who wish to use the law library, those detainees who are denied access on that day shall be provided access on the following day.

5. Effective immediately, the law library shall be open for detainee use at least forty hours per week, including at least eight hours during the weekend and at least three hours on each of two weekday evenings. Each detainee shall be allowed access for a period of at least two hours on each day that the library is in use and, if there is an immediate need for additional time, such as an impending court deadline, detainees shall be allowed greater access; provided, however, that if on a particular day, with maximum use of the law library, defendants must deny access to certain detainees because there is insufficient space to accommodate all detainees who wish to use the law library, those detainees who are denied access on that day shall be provided access

on the next day on which the library is open.

BB. LOCK-IN/LOCK-OUT TIME

1. Defendants shall not require any detainee who is not in punitive segregation to be confined to his cell except during the following periods:

a. by a date to be determined in accord with the provisions of paragraph EE, infra, at night, for no longer than 8 hours, beginning no earlier than 11 p.m.

b. during the day, only when essential for institutional business which can be carried out only while detainees are locked in their cells, and, by a date to be determined in accord with the provisions of paragraph EE, infra, in no event for a total of more than two hours in any 24-hour period.

2. Defendants shall permit detainees to lock in or out of their cells halfway through any lock-out period of two hours or more and, by a date to be determined in accord with the provisions of paragraph EE, infra, in any event, at time intervals of no more than one hour during any lock-out period. At each interval in which detainees are permitted to lock in or out of their cells, those detainees who wish to return to their cells to retrieve personal items shall be permitted to do so and shall not be required to be locked into their cells.

3. Nothing in this stipulation shall be construed as resolving the issues of whether in an emergency these procedures may be suspended, what constitutes an emergency or what procedures could be followed in the event of an emergency.

CC. TELEPHONES

1. Defendants shall permit all detainees to receive incoming calls of an emergency nature, as well as calls from an attorney, or for either category of calls, a message may be taken and the detainee shall be permitted to return the call as soon as possible, but in any event that such incoming call is received after the commencement of the evening lock-in, the return call shall be permitted no later than the following morning. The call made in response to such a message shall be allowed in addition to the detainee's guaranteed daily calls.

2. Nothing in this paragraph resolves any questions regarding telephone service other than the right to receive calls of an emergency nature as well as calls from an attorney; all other questions regarding telephone service remain to be resolved by agreement of the parties or determined by the Court.

DD. OPTIONAL LOCK-IN

1. Defendants shall maintain a policy that any detainee who chooses to remain in his cell shall have the option to do so during all lock-out periods without exception; provided, however, that nothing in this provision shall prevent defendants from denying optional lock-in to a detainee in mental observation status if a psychiatrist treating that detainee determines that optional lock-in poses a serious threat to the safety of that detainee.

EE. IMPLEMENTATION DATES FOR PORTIONS OF PARAGRAPHS A, D, E, AA, BB

Within two weeks after the signing of this stipulation, the parties shall meet in an effort to agree upon the date(s) by which full implementation of paragraph A and E of this stipulation, regarding receipt of packages by mail and package delivery service; paragraph D of this stipulation, regard the provision of laundry services; paragraph AA, regarding the hours of library access; and paragraph BB, regarding the lock-in/lock-out schedule, shall be achieved. In the event that thee parties agree upon the date(s) for the implementation of any or all of these provisions, the parties shall submit a stipulation, which sets forth these date(s) to the Court. In the event that the parties are unable to agree to any or all of the dates for implementation, they shall immediately request the Court to decide upon a city-wide implementation date and to permit the parties to be heard on that issue. Within two weeks of the granting of such permission, defendants shall submit to the Court a plan and date by which they expect to achieve full implementation; plaintiffs shall submit their reply, if any, two weeks thereafter. Provided, however, that whether by stipulation or by Court determination, defendants agree that time shall be of the essence in their performance of all tasks necessary to fully implement the provisions of paragraphs A, D, E, AA, and BB, and that such tasks shall be done upon an expedited basis, and in no event shall full compliance with paragraph BB be achieved later than nine months from the signing of this stipulation; nor shall full compliance with paragraphs A, D, E and AA be achieved later than one year from the signing

of this stipulation.

IT IS FURTHER STIPULATED that in order to monitor compliance with the terms of the partial final judgment by consent incorporating the terms of this stipulation, defendants agree: (1) to respond to written or oral questions from plaintiffs' counsel relative to implementation of the judgment and, upon request, to supply them with relevant, non-privileged material concerning implementation, including, but not limited to, records, logs and reports maintained in the institution, and rules, regulations, operating procedures and directives issued by defendants; (2) plaintiffs' counsel shall be permitted to confer confidentially with any individual detainees and with the inmate council; plaintiffs' counsel shall also be permitted to confer confidentially with other groups of detainees, subject to defendants' right to reasonably limit the number of detainees in any such group and to bar any particular detainees from participating in such group conferences when, in their judgment, it is required for the security of the institution; nothing in this paragraph is intended to resolve or address the issue of plaintiffs' counsel's right to confer confidentially with groups of the plaintiff class and their legal representative and for purposes other than monitoring compliance; (3) in addition, plaintiffs' counsel and/or experts, upon request, shall have access to any area of the institution for the purpose of observing compliance with this judgment whenever they have a reasonable belief that such measures is appropriate and that other sources of information are inadequate; provided, however, that such access may be subject to reasonable security and scheduling conditions established by defendants.

IT IS FURTHER STIPULATED that defendants shall, at a minimum, implement the terms and provisions of the partial final judgment by consent incorporating the terms of

this stipulation, and any other outstanding orders, at any new facility(s) that may be constructed or used in the future by defendants to confine pretrial detainees who would otherwise have been confined in HDM; if necessary, defendants agree to the entry of a separate order, in this or any other case, to effectuate the terms of this agreement.

IT IS FURTHER STIPULATED that, in the event that a dispute arises as to whether any party is in compliance with the terms of the partial final judgment incorporating the terms of this stipulation, the parties shall proceed as follows:

Both parties shall make a good faith effort to resolve any differences which may arise between them over such terms. Prior to institution of any proceeding before the Court to enforce the provisions of the partial final judgment, plaintiffs' counsel shall notify defendants' counsel, counsel for the Department of Correction, and the Deputy Mayor for Criminal Justice, in writing, of any claim by plaintiffs that defendants are in violation of any provision thereof.

Within five days of the receipt of said notice, plaintiffs and defendants shall meet in an attempt to arrive at an amicable resolution of claim. If the parities fail to effect such resolution, either party, within five days of said meeting, may request a conference with representatives or members of the New York City Board of Correction, and, in such event, both parties and said representatives or members of the Board shall meet, within l0 days of the request to the Board, in an attempt to resolve the matter amicably. If there is no request for such meeting, or if such meeting is not held within ten days, or if after five days following such meeting the matter has not been resolved to plaintiffs' satisfaction, defendants shall be so informed by plaintiffs' counsel and plaintiffs may then have due recourse to the Court.

However, where plaintiffs' counsel asserts a claim that

involves a threat to the immediate physical or mental well-being of any member of the plaintiff class, plaintiffs shall have due recourse to the Court within 24 hours of notification to defendants' counsel of such claim.

IT IS FURTHER STIPULATED that the term "defendants," as used in this stipulation, shall be understood to include defendants, their employees, agents or those acting in concert with them.

IT IS FURTHER STIPULATED that defendants shall take all necessary steps to conform all departmental rules, regulations, directives and other administrative orders to the terms of this stipulation.

IT IS FURTHER STIPULATED that, in the event a partial final judgment incorporating the terms of this agreement is approved and entered by the Court, counsel for plaintiffs shall prepare a notice to the plaintiff class incorporating the terms of that partial final judgment, and deliver a sufficient number of copies of the notice to the wardens of HDM and the annex known as C-7l for posting. The wardens of HDM and the C-7l annex shall cause a copy of this notice to be kept posted in each housing area and dayroom, the library, attorney and personal visiting areas, the receiving room, program areas and other common areas of HDM and C-7l. Copies of the notice shall also be made available to detainees in he library for personal reference and, upon request, copies shall permanently be given to detainees for their own use. In addition, counsel for plaintiffs shall prepare a separate, abbreviated notice for members of the plaintiff class, which indicates, among other things, the entry of the judgment, the issues resolved therein and plaintiffs' counsel's identity and address. A sufficient number of copies of the notice shall be delivered to the wardens of HDM and the C-7l annex, who shall have such notice given by hand to

each present detainee. Thereafter, each detainee, upon admission, shall be provided with either a copy of such abbreviated notice at defendants' expense or equivalent notice contained in an institutional handbook.

Dated: New York, New York
November 29, 1978

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES BENJAMIN, et al.,

Plaintiffs,

Decision and Order

-against-

75 Civ. 3073 (HB)

Bernard KERIK, Commissioner of the NEW YORK CITY DEPARTMENT of CORRECTION et al.,

Defendants.

HAROLD BAER, JR., District Judge:

Plaintiffs, a class of pretrial detainees, move for an order that requires the defendants to improve the fire safety conditions at the Brooklyn and Bronx Houses of Detention as well as the modular units on Rikers Island, to comply with Consent Decrees between the parties. A hearing was held and testimony taken on May 26 and May 27 as well as June 1 through June 3, 1998. For the reasons discussed below, certain relief is GRANTED.

I. Background

The original Consent Decrees at issue in this litigation were agreed to in 1978-79. They are designed to ensure the safety and humanity of prison conditions. Institutionally, the Consent

Decrees, among other things, strive to maintain the physical plant of the jails in a condition safe for human habitation. On December 17, 1993 an order was issued that required fire safety improvements which included a functioning alarm system, operable smoke detectors or heat sensors, sprinkler systems not dependant on human intervention and electronic egress doors.

The Bronx House of Detention is a nine-story jail constructed primarily of concrete and steel that houses 400 beds on the second through sixth floors. The Brooklyn House of Detention is an eleven story structure that houses 800 inmates in two-tiered cell blocks with open barred fronts. The modular housing units on Rikers Island are generally one story wood-framed structures appended to the Adolescent Reception and Detention Center ("ARDC"), the Anna M. Kross Center ("AKC"), the George Motchan Detention Center ("GMDC") and the Rose M. Singer Center ("RMSC"). The modular units contain only dormitory style housing and are guarded by at least two correction officers 24 hours per day.

A. Plaintiffs' Fire Safety Concerns

1. Modular Units

At the hearing plaintiffs presented evidence of several fire safety problems in the modular units. To begin with, the sprinkler systems were originally built as pre-action systems and they did not fill with water until after a signal from the smoke detectors. However, leaks in the modular unit roofs would short these detectors, and as a consequence the signal to the sprinkler systems became unreliable. Accordingly, the Department of Correction undertook to convert the pre-action systems to wet systems that simply needed a signal from the sprinklers' heat detectors to begin releasing water. Unfortunately, in several modular units wet systems were apparently not installed, and as a result, pre-action sprinkler systems prone to malfunction remained in place. (Tr. 88,

147-49)

The plaintiffs also presented evidence of malfunctioning fire alarms that were physically damaged or extremely dirty. (Tr. 339-40, 850) Further evidence was presented to show that staff members, including a jail fire safety officer at GMDC, could not reset an alarm when it went off accidentally or even explain the functions of various fire alarm panels. (Tr. 274-75, 334-35) The modular units presently have two means of egress. The rear egress doors have magnetic locks that release when an alarm is confirmed by a signal from the control room. At times, these magnetic locks have malfunctioned, a situation that caused the Department of Correction to padlock some doors from the outside. These padlocks, the plaintiffs contend, violate an order that requires the modular doors to be "openable at all times by an electronic lock." Ex. 8 at P 3. Although the magnetic locks have been repaired, many of the doors remain padlocked from the outside, creating a potential fire hazard given the possible delay in opening the doors in case of an emergency.

Roof leaks are largely responsible for the fire alarm and exit malfunctions. (Tr. 127-28) In 1997, the defendants began to replace the defective roofs by using a sprayed foam roofing system. While this system appears to have reduced the number of leaks and the resultant damage to fire safety equipment, the plaintiffs presented evidence from an architect, Elliot P. Rothman, who concluded that the new roofs were installed in a haphazard fashion and are likely to leak in the future. (Tr. 190, 209-10, 214-15) Lastly, there was a concern that the modular units are not compartmentalized and thus a fire in one area could spread throughout the entire structure.

2. Bronx House of Detention

Here, there were two major facility design problems highlighted by the plaintiffs. Presently, there is no fire compartmentalization, a problem the plaintiffs argue is

significant since they contend there is no adequately secure area outside of the facility large enough to accommodate such an evacuation. A second concern relates to the sufficiency of egress. In the west wing dormitories on the second to sixth floors, there is only one means of egress--through a locked gate. Consequently, if a fire blocks that area the inmates on the west wing will be trapped. Another egress problem stems from the fact that the four stairways do not discharge directly outside. Rather, the stairways all lead to either the ground or first floors. As a result, a fire on either of these floors would make it extremely difficult to evacuate safely.

The plaintiffs also express concern with the smoke detection, alarm and sprinkler systems. In particular, the alarm system is old and prone to false signals. Automatic sprinklers are only provided on part of the ground floor and have not been regularly maintained. Smoke detectors are limited to the elevator lobbies.

3. Brooklyn House of Detention

To begin with, a new alarm system installed in 1995 is not deployed. (Tr. 604) In addition, smoke detectors installed in the elevator lobbies, law library, telephone equipment room and housing area day room were not operational. (Tr. 606) Deputy Commissioner Antonio Figueroa attributed the delay, at least in part, to "paperwork." (Tr. 62) Even were these systems operational, the plaintiffs offered testimony to the effect that additional smoke detectors should be installed throughout the building to render the jail reasonably safe. The plaintiffs also presented expert testimony that suggested the need for additional sprinklers in any area where combustible material is or may be stored. These areas include the basement, first and second floors and third floor kitchen--where high combustible loading occurs. (Tr. 623)

Smoke and fire compartmentalization exists only between

floors. Accordingly, any smoke or fire condition that arises in one area will likely spread across the entire floor without containment. The facility, according to the plaintiffs, also suffers from egress problems. Despite the existence of two stairways that lead out of the building, there is in essence only one means of egress. (Tr. 69) The two stairways are located in the central core, approximately thirty feet apart. Plaintiffs contend that given the relatively close proximity of one stairway to the other, a serious fire could possibly block both exits. Finally, there are problems with the locking mechanisms in the facility. Many of the 120 cells are locked manually and would have to be individually unlocked by hand if a fire were to break out.

4. Maintenance of Fire Safety Equipment

The plaintiffs correctly assert that the maintenance of fire safety equipment is essential to protect inmates in case of fire and further that by definition the equipment remains unused for significant periods of time. Nevertheless, the fact is that the equipment must nonetheless be operational when an emergency arises. According to the plaintiffs, the Fire Safety Officer's ("FSO's") weekly inspections often failed to identify serious problems, such as fire extinguishers that required recharging or improperly blocked exits. (Tr. 778-79, 781-83) More troubling, the plaintiffs contend, is the failure to correct identified deficiencies. For instance, in 1996 and again in 1997 the defendants promised to repair a gate that impaired egress at the Bronx House of Detention. (Tr. 499-500) The gate, however, was not corrected until 1998--shortly before the fire safety hearing occurred. (Tr. 501)

In a similar vein, there were standpipes in the Brooklyn House of Detention that could not be opened by hand, that the defendant has promised to remedy since 1995. Again, the standpipes were not replaced until immediately prior to the

hearing. (Tr. 507-11, 528-29) Figueroa conceded that many fire safety violations remained uncorrected from year to year, and as a general matter he could not explain the failure to act. (Tr. 118) According to the testimony of Nicholas Mazzola, a FSO with the Department of Correction, many of the deficiencies that went uncorrected for lengthy periods of time were capital projects that required significant funds. (Tr. 460)

B. Department of Correction Response

In response to these fire safety concerns raised long before the hearing, the Department of Correction to its credit undertook a comprehensive improvement program.[1] In the modular housing units, most of the leaking roofs that caused damage to fire safety equipment in general, and electromagnetic locks in particular, were replaced.

At the Bronx House of Detention, additional compartmentalization is planned that includes upgrading doors to enable them to be fire-rated, restoration of the fire ratings of interior partitions and improving the fire safety between utility chases and housing floors. (Tr. 46-48) Also, the defendants are constructing an additional means of egress that will serve the

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[1] The fire safety improvements are being undertaken pursuant to three contracts. The C-138 contract entails fire safety improvements proposed for all of the facilities at issue in this litigation. (Tr. 26); Ex. 135. The C-104 contract is a capital program providing for extensive renovations in the borough correctional facilities, and fire safety is an integral component. (Tr. 26-27); Ex. 135. The C-141 contract affects all facilities and any work performed in the kitchen area, with a fire safety component also included. (Tr. 27); Ex. 135.

west dormitory areas, and the north stairs are being extended from the fifth to the sixth floor. (Tr. 49, 52) In addition, improvements include the installation of smoke detectors throughout the basement and ground floor, on the second through ninth floors with the exception of the cells, in the catwalks, dormitory areas, central core, day rooms at the end of the north and south wings, storage areas and in the air handling units. The defendants have removed combustible material previously stored in the seventh floor gym. Perhaps most importantly, the defendants are installing a centralized fire alarm system that features new panels and pull stations in the central core, day rooms in the north and south wings, housing floor dorms, first floor and basement.

With respect to the Brooklyn House of Detention, two additional means of egress will be constructed on the north side of the facility, providing another mode of exit from cell areas in the east and west wings. (Tr. 72) This project is presently in the design phase. The defendants have installed new smoke detectors on the first and second floors. In addition, smoke detectors will be installed in the third floor kitchen and in the catwalks. Similarly, there are plans to install sprinklers in the central core and in program spaces on the housing floors. (Tr. 77) Areas that contained large volumes of combustible materials, such as records and debris, have been cleaned out and the mechanical, electrical and boiler rooms have been cleared. Finally, the defendants have installed an addressable supervised alarm system with pull stations, gongs, strobe lights and integrated smoke detectors.

II. Discussion

"Ensuring compliance with a prior order is an equitable goal which a court is empowered to pursue even absent a finding of contempt." *Berger v. Heckler*, 771 F.2d 1556, 1569 (2d Cir.1985) (district court appropriately amended decree given

"its duty to protect the integrity of its judgments"); *see also Juan F. By and Through Lynch v. Weicker*, 37 F.3d 874, 878-79 (2d Cir.1994) (adjustment of consent decree to ensure compliance proper despite absence of contempt finding). Accordingly, I need not find that the defendants are in contempt to issue an order that enforces the Consent Decrees between the parties.

Plaintiffs, a class of pretrial detainees, seek an order that enforces Section S of the original Consent Decree that requires the maintenance of "safe" correctional facilities. The Due Process clause of the Fourteenth Amendment governs claims brought by pretrial detainees with respect to conditions of confinement. *See Bell v. Wolfish*, 441 U.S. 520, 535 n. 16, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The absence of adequate and reliable fire protection can give rise to a Fourteenth Amendment Due Process claim. *See Harrison v. Ienuso*, 1995 WL 375915, at *2 (S.D.N.Y. Jun.23, 1995). Accordingly, a "safe" correctional facility for pretrial detainees must comport with the requisite standards of the Due Process clause of the Fourteenth Amendment. In *Harrison*, the court concluded that "fire safety conditions that are adequate, and do not subject detainees to a constant [and] imminent risk of death or injury impose no severe hardship on detainees and therefore do not offend the Constitution." *Id.* (citation and internal quotations omitted).

The plaintiffs, however, contend that the "constant and imminent risk" language articulated in *Harrison* must be interpreted consistently with the Supreme Court's decision in *Helling v. McKinney*. 509 U.S. 25, 32-34, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993). I agree. In *Helling*, the Supreme Court held that a prisoner stated a viable Eighth Amendment claim given the potential health problems that might arise as a result of exposure to cigarette smoke. *Id.* at 28-29, 37. The defendant

there argued that only deliberate indifference to current and serious inmate health problems can give rise to an Eighth Amendment claim. *Id.* at 34. The Supreme Court rejected this argument, and concluded that an allegation that prison officials exposed an inmate to levels of environmental tobacco smoke that "pose an unreasonable risk of serious damage to his future health" is actionable under the Eighth Amendment. *Id.* at 34-35.

The Due Process rights of pretrial detainees "are at least as great as the Eighth Amendment protections available to a convicted prisoner." *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983); *see also County of Sacramento v. Lewis,* --- U.S. ----, ----, 118 S.Ct. 1708, 1718, 140 L.Ed.2d 1043 (1998) ("Since it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners ... it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims ...."); *Weyant v. Okst,* 101 F.3d 845, 856 (2d Cir.1996) (same). Given that the rights of pretrial detainees under the Due Process clause of the Fourteenth Amendment are at the very least co- extensive with those of convicted prisoners under the Eighth Amendment, I conclude--consistent with *Helling*--that fire safety protections must be afforded at a level that does not expose the plaintiffs to an unreasonable risk of serious damage to their future health. *See Helling*, 509 U.S. at 33 (constitutional protection "against future harm to inmates is not a novel proposition").

While the conditions in the modular units, Bronx House of Detention and Brooklyn House of Detention pose an unreasonable risk of serious damage to the future health of pretrial detainees through fire, the improvements, both those implemented and scheduled, "have substantially reduced the extent to which judicial interference is warranted." *Coniglio v.*

Thomas, 657 F.Supp. 409, 414 (S.D.N.Y.1987) (extensiveness of remedy curtailed by fire safety improvements made after the onset of litigation). While each of the proposed improvements should be timely made, it is particularly important that the defendants diligently act with respect to the conversion of all sprinklers in the modular units to wet systems, implementation of the centralized alarm system in the Bronx House of Detention and construction of the two additional means of egress in the Brooklyn House of Detention.[2]

Therefore it is directed that: (1) to ensure that these improvements-- necessary to the operation of constitutionally adequate fire safe facilities-- are completely implemented, the defendants are to adhere to the currently proposed schedules for completion. At the Bronx House of Detention the improvements undertaken pursuant to the C-138 project--which include a new
supervised fire alarm system and an electronically operated gang release system--are "expected to be completed by the end of calender year 1999." Ex. 135 at pp. 1-2. The contract for construction of a second means of egress at the Brooklyn House of Detention will be registered with the New York City Comptroller prior to the end of June 1999 and "is expected to take two years and therefore be completed by June 2001." Ex. 135 at p. 3. Design changes at the Brooklyn House of Detention--which include improvements in the fire alarm, smoke detection and fire suppression systems, as well as enhanced egress, fire separation and smoke management--are

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[2]The improvements are comprehensively detailed in Section I.B of this decision.

"scheduled and budgeted for Fiscal Year ("FY") 1999, and construction is scheduled to commence in FY 2000 and to be completed in FY 2002." Ex. 135 at p. 3. At modular housing units six and seven at GMDC on Rikers Island, automatic dry or wet sprinkler systems will be installed, egress improved and better fire and smoke detection systems added. Ex. 135, Attachment A. These improvements were "expected to begin in July 1998 and to take approximately six months to complete." Ex. 135 at p. 5.

It is further directed that: (2) the defendants are to appraise the plaintiffs and the Office of Compliance Consultants ("OCC") of all progress and any potential delays in the improvement projects. This is to be accomplished by the submission of quarterly status reports, in letter form, beginning on January 4, 1999.[3] *Cf. United States v. Oregon State Medical Soc.*, 343 U.S. 328, 333 (1952) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.").

Further it is directed that: (3) the defendants submit to the Court, within sixty days of the date hereof, a proposed internal procedure for responding to Fire Safety Unit reports that will ensure that deficiencies are promptly identified and corrected. Since the occurrence of fires and especially fires of a life-threatening nature are infrequent, safety equipment such as extinguishers may often remain dormant for extended periods of time. In an emergency, however, the equipment must be in

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[3]Thereafter, status reports are due on the first Monday in each subsequent quarter until further order of the Court.

working order. Consequently, the failure when needed of such equipment could result in serious physical injury or the loss of life, and therefore must be functional to ensure constitutionally safe facilities. *See Jones v. City and* County of San Francisco, 976 F.Supp. 896, 908 (N.D.Cal.1997) (defendants abdicated constitutional responsibility to provide reasonably safe fire protections where, among other problems, fire-rated door assemblies and automatic sprinklers were not installed); *Coniglio*, 657 F.Supp. at 414 (smoke barriers and system of effective smoke management found "necessary to provide minimum fire safety for the plaintiff class as required by the Constitution").

Finally on an allied tack, the evidence suggests that not infrequently, the weekly inspections as presently carried out fail to identify serious problems, such as fire extinguishers that require recharging or improperly blocked exits that could leave individuals trapped should a fire occur. (Tr. 778-79, 781-83) Unfortunately, even when deficiencies were reported, the resultant fire safety violations often went uncorrected from year to year--without explanation. (Tr. 118; 507-11; 528-29) Given this pattern, taken together with the concern of both parties that fire safety equipment be functional at all times, an improved internal procedure is appropriate. The parties are directed to draft such a procedure in consultation with OCC, within sixty days of the date hereof, and to arrange a conference with the Court on or before January 15, 1999 should any problem arise. See *Hoptowit v. Spellman*, 753 F.2d 779, 784-85 (9th Cir.1985) (while the court "need not wait until actual casualties occur" to order relief it should not "tell the administrators of the prison how to cure the unconstitutional conditions").

SO ORDERED.

New York, New York
November 12, 1998

s/ Harold Baer, Jr.
United States District Judge

Supreme Court, U.S.
FILED
JUL 13 1999
OFFICE OF THE CLERK

No. 98-1-02042

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES BENJAMIN, *et al.*,

Petitioners,

– against –

BERNARD KERIK,
Commissioner, New York City Department of
Correction, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTER-QUESTIONS PRESENTED

1. Whether Congress has the power to alter the prospective effect of continuing judicial decrees?

2. Whether the termination of the Consent Decrees under the Prison Litigation Reform Act of 1996, 18 U.S.C. § 3626(b), violates the rights to constitutional due process of inmates who had been the beneficiaries of a prospective injunctive consent decree?

3. Whether the termination of the Consent Decrees under the Prison Litigation Reform Act of 1996, 18 U.S.C. § 3626(b), violates the rights to equal protection of the laws of a group that is not a suspect class?

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COUNTER-STATEMENT OF THE CASE

The Prison Litigation Reform Act of 1995

On April 26, 1996, Congress enacted the Prison Litigation Reform Act of 1995[1] (the "PLRA") to curtail undue judicial management of local prisons in the absence of any ongoing violation of inmates' federal rights; to prevent the expansion of consent decrees beyond federal violations alleged in the complaint; and to reduce the practical difficulties of modifying prison conditions decrees. Section 3626 accords with this Court's admonitions in *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 2183 (1996) -- controlling precedent that petitioners fail even to cite -- that remedial relief in prison conditions cases "must of course be limited to the inadequacy that produced . . . the injury-in-fact" established by a plaintiff or plaintiffs, and that systemwide relief is improper absent systemwide injury-in-fact. Section 3626 has been upheld as constitutional by seven Circuit Courts of Appeals and struck down by none, and this Court has declined to review its constitutionality five times.[2]

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[1] Pub. L. No. 104-134, 110 Stat. 1321, §§ 801-810 (Apr. 26, 1996) (§ 802 codified at 18 U.S.C. § 3626).

[2] *See Benjamin v. Jacobson*, 172 F.3d 144 (2d Cir. 1999) (*en banc*), *petition for cert. filed June 21, 1999*; *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3d Cir. 1999); *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998), *cert. denied sub nom. Hadix v. McGinnis*, __ U.S. __, 118 S. Ct. 2368 (1998); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997) (*per curiam*), *cert. denied*, __ U.S. __, 118 S. Ct. 2375 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 2366 (1998); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997), *cert. denied*, __ U.S. __, 118

(continued...)

Section 3626 defines the contours of prospective relief that federal courts may order or approve in actions brought to redress unlawful conditions in state or local prisons. Section 3626(a) limits prospective relief in a prison conditions action to that which is both necessary and narrowly tailored to correct current unconstitutional conditions of confinement.[3] Under § 3626(b)(2), defendants may move for immediate termination of all prospective injunctive relief, "whether . . . granted or approved before, on or after" enactment of the PLRA, on the basis that it does not meet the need and narrow tailoring requirements of § 3626(a). The PLRA also includes an express limitation on the termination provision, mandating that prospective relief "shall *not* terminate" if:

> the court makes written findings based on the record that prospective relief remains

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[2] (...continued)
S. Ct. 2374 (1998); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 520 U.S. 1277 (1997); *see also Taylor v. United States*, 143 F.3d 1178 (9th Cir.), *opinion withdrawn*, 158 F.3d 1059 (9th Cir. 1998), *superseded by* 1999 U.S. App. LEXIS 13405 (9th Cir. June 18, 1999) (constitutional challenges not reached because held to be moot).

[3] Specifically, 18 U.S.C. § 3626(a)(1) provides in pertinent part:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

> necessary to correct a current and ongoing violation of the Federal right,[4] extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

18 U.S.C. § 3626(b)(3) (emphasis added).

The Consent Decrees

The consent decrees that have governed respondents in this case for the past twenty years (the "Consent Decrees") are a prime example of the sort of "wildly . . . intrusive" judicial decree that this Court decried in *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. at 2185. Although the Consent Decrees were initially formulated to remedy conditions of confinement that were alleged but never proven to exist twenty-four years ago, in *Benjamin v. Malcolm* and other complaints subsequently consolidated with it in 1975. *See* Joint Appendix on Appeal ("JA") 134-92, 309-25; Pet. at 7a. However, they have since "generated a judicially administered structure comprising over ninety related court orders, and extending to more than thirty discrete areas of prison administration" regulated in minute detail.[5] Pet. at 8a. In that regard, the Consent

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[4] At the time of the district court's and panel's decisions, this language was "current *or* ongoing." The language was subsequently clarified to read "current *and* ongoing." Pub. L. No. 105-119, 111 Stat. 2440 (November 27, 1997) at § 123(a)(2) (emphasis added).

[5] For example, the Consent Decrees require that "[n]either coffee, tea nor milk shall be pre-sweetened"; that menus "respond to the ethnic, (continued...)

Decrees closely resemble the order that this Court in *Lewis* termed "the *ne plus ultra* of what our opinions have lamented as a court's 'in the name of the Constitution, becom[ing] . . . enmeshed in the minutiae of prison operations.'" (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)).

In many respects, the Consent Decrees go well beyond present constitutional norms; for example, they prohibit double-celling, mandate extensive access to both legal materials and legal coordinators, require the distribution of free newspapers, and mandate free local telephone calls. In certain instances, the prospective relief goes to issues or subject matters that were not even raised in the complaint. Thus petitioners' references to respondents' alleged "noncompliance" within the past ten years relate nearly exclusively to noncompliance with the Consent Decrees, not with constitutional standards. In addition, any changes in these provisions, whether major or minor, must receive federal judicial approval, generally obtained only after voluminous discovery and protracted negotiation with plaintiffs' counsel.[6]

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[5] (...continued)
religious and social needs and tastes of the detainee population"; that certain areas of the jails be cleaned with a solution consisting of 1/4 cup Boraxo to a gallon of water; and that mops be stored in a particular manner.

[6] For example, within the past four and a half years, in the interest of reducing inmate-on-inmate violence, the Department was required to undergo protracted processes involving multiple negotiating sessions with plaintiffs' counsel, motion practice, and extensive discovery, simply to prohibit "gang-identifying" jewelry (JA274) and, later, to (continued...)

Furthermore, contrary not only to the PLRA but also to this Court's jurisprudence, *see Freeman v. Pitts*, 503 U.S. 467, 491 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237, 247-50 (1991), the Consent Decrees are enforceable in perpetuity. The Disengagement Plan approved in 1987, while providing for the temporary suspension of enforcement of individual provisions of the Consent Decrees, does not establish a "method for ending this litigation", as petitioners assert it does. Pet. at 6. On the contrary, even after the Department has been officially certified as fully complying with every provision of the Consent Decrees, it requires the case to be transferred to and to remain indefinitely on the District Court's inactive docket, from which petitioners will be entitled to revive it at any time on a showing of noncompliance with any term of the Consent Decrees, whether or not such alleged noncompliance would constitute a constitutional violation (JA210-11, 217, 242, 278). Respondents will also remain obliged in perpetuity to perform regular, formal audits establishing their compliance with the more than thirty issues encompassed by the Consent Decrees (JA242, JA278) and to obtain court approval of any changes in Consent Decree provisions (JA213, 242, 278).

Conditions in the Jails as of 1996

Petitioners state that defendants "still had not complied" with the Consent Decrees when the proceedings below commenced in 1996. Pet. at 6. They cite two reports

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[6] (...continued)
modify the delivery of law library services to the 350 inmates housed in the Central Punitive Segregation Unit. *See Benjamin v. Jacobson*, 923 F. Supp. 517 (S.D.N.Y. 1996).

by the court-appointed monitor, the Office of Compliance Consultants ("OCC"), one in early 1996 in which they claim "OCC reported non-compliance in a number of significant areas," and another in mid-1996 citing "continuing noncompliance" involving primarily physical plant issues. In most of these areas, however, OCC's complaints were insignificant.[7] In fact, the two 1996 reports, read together with the Department's responses, demonstrate a high degree of compliance with the Consent Decrees (JA250-57, 279-81).

Under both the PLRA and *Lewis v. Casey*, moreover, the proper standard is compliance not with the Consent Decrees, but with the Constitution. Since 1996, the District Court has found that only a single instance of noncompliance violated constitutional requirements. *See* Opinion of the United States District Court for the Southern District of New York Concerning Jail Fire Safety (Nov. 12, 1998), Pet. at 247a. And, with regard to that one instance, the Court held that respondents' pre-existing plans would adequately remedy fire safety conditions at the few correctional facilities at issue, and imposed no remedy other than the completion of those plans and the institution of a new procedure for responding to internal reports of fire safety deficiencies. Pet. at 255a-258a.

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[7] For example, petitioners' reference to reported noncompliance with food service requirements, Pet. at 6, concerns such matters as the failure of inmate food service workers to wear hair nets, aprons or gloves on isolated occasions (JA350-55).

Proceedings Below

Respondents moved in the District Court on May 24, 1996 for an order vacating the Consent Decrees pursuant to § 3626(b)(2) of the PLRA. In opposition, petitioners challenged the constitutionality of the statute but did not seek an opportunity under § 3626(b)(3) to establish the existence of current or ongoing unconstitutional conditions warranting the continuation of injunctive relief. *Benjamin v. Jacobson*, 935 F. Supp. 332, 336-37, 343 (S.D.N.Y. 1996) (*Benjamin I*), Pet. at 142a, 156a (JA246). On July 23, 1996, the District Court granted respondents' motion and vacated the Consent Decrees in their entirety, rejecting each of petitioners' constitutional arguments. Petitioners moved to alter or amend the order, or in the alternative for a stay of the order pending appeal; only at the end of their reply brief on that motion, in a footnote, did petitioners seek an opportunity to make a showing pursuant to § 3626(b)(3) at some unspecified future time that there then existed at the jails any current or ongoing unconstitutional conditions of confinement. The District Court denied the motion in all respects except as to the application for a stay, which it granted pending an application to the Court of Appeals for a stay pending appeal (JA92-93).

The Court of Appeals granted a stay pending appeal and, on August 26, 1997, affirmed the District Court order in part and reversed in part. *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997) (*Benjamin II*), Pet. at 101a. The panel rejected all of petitioners' constitutional arguments, but construed § 3626 as providing for judicial termination of only further federal court enforcement of consent decrees; the decrees were not themselves to be terminated, remaining in effect as contracts enforceable in state court.

Pet. at 134a. The panel continued in effect the stay of the District Court order, pending review by this Court.

On December 27, 1997, the Court of Appeals granted respondents' application for rehearing *en banc*. *See* Pet. at 99a. On March 23, 1999, the *en banc* Court affirmed the District Court's decision upholding the constitutionality of § 3626 and held that the statute provided for termination of the Consent Decrees themselves, not just of further federal court enforcement of the decrees. However, the Court of Appeals reversed the District Court's order insofar as it directed the *vacatur* of the Consent Decrees rather than their termination, and it remanded the case to the District Court for further proceedings pursuant to § 3626(b)(3). *Benjamin v. Jacobson*, 172 F.3d 144 (2d Cir. 1999) (*en banc*) (*Benjamin III*), Pet. at 1a. The Petition For A Writ Of Certiorari (the "Petition") was filed on June 21, 1999.

REASONS FOR DENYING THE WRIT

I. THERE IS NO COMPELLING REASON UNDER RULE 10 FOR REVIEW OF THE DECISION BELOW

Review on a writ of certiorari is a matter of this Court's discretion, and is granted only "for compelling reasons". Rule 10, Rules of the Supreme Court of the United States ("Rule 10"). Petitioners set forth no compelling reason for review of the decision below, and indeed fail even to mention this Court's standards for granting petitions for certiorari as set out in Rule 10.

One reason that this Court might grant review by certiorari would be the existence of a conflict among the Circuits on "an important matter." Rule 10(a). In this case, there is no conflict at all among the seven Circuits that have decided any of the constitutional issues of separation of powers, due process, and equal protection that are presented in the Petition. *See Benjamin III, supra*; *Imprisoned Citizens Union*, 169 F.3d 178; *Hadix*, 133 F.3d 940; *Dougan*, 129 F.3d 1424; *Inmates of Suffolk County Jail*, 129 F.3d 649; *Gavin*, 122 F.3d 1081; *Plyler*, 100 F.3d 365; *cf. Taylor*, 1999 U.S. App. LEXIS 13405 (constitutional challenges not reached because held to be moot).[8] These decisions are all consistent with one another in their analysis of the constitutional and statutory issues presented.

Moreover, as noted above and discussed in Point II below, the *en banc* decision of the Second Circuit is fully consistent with the prior decisions of this Court. *See* Rule

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[8] Petitioners' Supplemental Brief (July 12, 1999) does not alter this conclusion. Petitioners go to great lengths, even engaging in abstruse analysis of the composition of various courts and panels, to persuade this Court of the existence of a conflict among the Circuits. Their conclusion, however, relies upon reading the tea leaves of dictum and dissent, and ignores the holding of the *en banc* Ninth Circuit Court of Appeals, which expressly declined to reach the issue of the constitutionality of § 3626(b). At best, petitioners have anticipated a future determination that does not accord with the unanimity of the Circuits that have decided these constitutional issues to date. If and when such a determination is made, the parties to that future action may then petition this Court for a writ of certiorari. For now, *Taylor* -- whether or not it reveals a split *within* the Ninth Circuit -- provides no basis for granting certiorari in this case.

10(c).[9] This Court has denied all five petitions for certiorari on these issues in the last two years. Just as those decisions did not warrant review by this Court, neither does the decision of the Second Circuit below. In short, there is no compelling reason for this Court to grant petitioners the writ.

II. THE TERMINATION PROVISION OF THE PLRA, 18 U.S.C. § 3626, HAS CONSISTENTLY BEEN UPHELD AS CONSTITUTIONAL

A. Congress has the power to alter the prospective effect of continuing judicial decrees

Petitioners reiterate their argument that the termination provision of the PLRA violates constitutional separation of powers principles by requiring federal courts to reopen final judgments. This Court has already declined, on five separate occasions, to review precisely this issue, *see cases cited supra* at 1 n.2, and petitioners present no new argument that would warrant this Court's review of the decision below. Instead, misreading *Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995), citing vacated and overruled decisions, petitioners rely on nearly universally rejected legal arguments and on rhetorical speculation about the putative calamitous consequences of allowing the termination provision of the PLRA, 18 U.S.C. § 3626, to stand.

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[9] Rule 10(c) identifies as a reason that this Court might grant a petition for certiorari that a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court."

In *Plaut*, this Court struck down a statute that purported to reopen final determinations of monetary damages and, reaffirming the validity of long-standing precedent, expressly excepted from its holding cases that, like this one, involve prospective injunctive relief.[10] *Plaut*, 514 U.S. at 232 (citing *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1855) (*Wheeling Bridge II*)); *see also Benjamin III*, 172 F.3d at 160-61 (interpreting *Plaut*). The *Plaut* Court thus reendorsed the *Wheeling Bridge II* principle that "legislation does not violate the separation of powers by 'alter[ing] the prospective effect of injunctions.'" *Benjamin III*, 172 F.3d at 161 (quoting *Plaut*, 514 U.S. at 232).

As the court below summarized the applicable law:

> Under the separation of powers [principles of *Plaut* and *Wheeling Bridge II*], Congress lacks the authority to alter a finally rendered judgment ordering the payment of money. On the other hand, to the extent that a court's final judgment consists of an injunction, Congress may require alteration or termination of its future effect if the law on which the injunction was predicated has been changed.

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[10] *Plaut* was a damage action under the Securities Act that invalidated legislation specifically intended to reopen cases previously dismissed under the statute of limitations. 514 U.S. 211.

Id.[11]

Under *Plaut* and *Wheeling Bridge II*, the application of the PLRA to an existing consent decree is consistent with separation of powers principles, as each Circuit that has addressed the issue has determined. *See cases cited supra* at 1 n.2. A judgment with continuing, prospective effects, although a "final judgment" in some senses, remains subject to change in response to new legislation. Indeed, this Court recently held that just such a judgment -- a court-ordered stipulation regarding attorneys' fees in an analogous prison conditions class action -- must be altered by operation of § 803(d)(3) of the PLRA, 42 U.S.C. § 1997e(d)(3), enacted after the entry of the judgment, which limits the hourly rate at which attorneys' fees may be awarded in prison conditions cases. *See Martin v. Hadix*, 67 U.S.L.W. 4500 (June 21, 1999).

The PLRA is an example of the sort of prospective legislation applicable to injunctive decrees that this Court has upheld at least since the time of *Wheeling Bridge II*. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992) (change in statutory law warrants modification of decrees with ongoing effects); *see also Benjamin III*, 172 F.3d at 161 (citing, *inter alia*, *System Federation No. 91 v. Wright*, 364 U.S. 642, 646-47 (1961); *United States v. Swift*

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[11] Petitioners' suggestion that there is no principled distinction between unpaid monetary damages and injunctive relief, Pet. at 17 n.17, is disingenuous. In the former circumstance, the right at issue, together with the remedy, have both been finally determined and adjudicated; all that remains for the future is the execution of the already-determined remedy. In the latter case, however, the contours of the remedy itself are not finally determined.

& Co., 286 U.S. 106, 114-15 (1932); *Wheeling Bridge II*, 59 U.S. (18 How.) at 431-32). Such legislation is applicable also when the injunctive relief is entered on consent. *See Swift*, 286 U.S. at 114; *Agostini v. Felton*, 521 U.S. 203, __, 117 S. Ct. 1997, 2006 (1997) ("A court errs when it refuses to modify an injunction or consent decree in light of [statutory or decisional law] changes.") (quoted in *Benjamin III*, 172 F.3d at 162). Contrary to petitioners' assertion, Pet. at 14-15 n.14, *Swift* and *Agostini* are not irrelevant; rather, they reaffirm the distinction, consistently upheld by this Court, between

> restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. . . .

Rufo, 502 U.S. at 379-80, *quoting Swift*, 286 U.S. at 114; *see also Western Union Telegraph Co. v. International Brotherhood of Elec. Workers*, 133 F.2d 955, 957 (7th Cir. 1943) ("though a decree may be final as it relates to an appeal and all matters included or embodies [sic] in such a step, yet, where the proceedings are of a continuing nature, it is not final").

Plaut protects the finality not of all judgments but only of judgments at law that represent "the last word of the judicial department with regard to a particular case or controversy." *Plaut*, 514 U.S. at 227. It is evident from the number of modifications made over the last two decades to the Consent Decrees in this case that such an executory decree with prospective effect is hardly the court's "last

word", even after the decree has become final for purposes of appeal. In *Plaut*, the Supreme Court reaffirmed that legislation that alters the law applicable to an executory consent decree warrants revisiting that decree if the legislation is enacted while the consent decree is still subject to enforcement. *Id.*, 514 U.S. at 232.

Petitioners cannot cite any authority to dispute the constitutional validity of the PLRA, and their challenge therefore relies on a combination of vacated and overruled decisions, fallacious reasoning, and their own speculation about the ramifications of upholding the statute. *See, e.g.*, Pet. at 12-13 (citing *Taylor v. United States*, 143 F.3d 1178 (9th Cir.), *opinion withdrawn*, 158 F.3d 1059 (9th Cir. 1998), *superseded by* 1999 U.S. App. LEXIS 13405 (9th Cir. June 18, 1999); *Denike v. Fauver*, 3 F. Supp.2d 540 (D.N.J. 1998), *overruled by Imprisoned Citizens Union v. Shapp*, 169 F.3d 178 (3d Cir.)).

For example, contrary to petitioners' assertions, the PLRA does not *require* a court to set aside anything, in contrast to the Securities Act amendments struck down in *Plaut*, which required dismissals to be reopened. *Cf.* Pet. at 9, 15.[12] Rather, Section 3626(b)(3) provides that prospective relief *shall not* terminate if the court "makes

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[12] Petitioners' claim that the PLRA requires judicial revision of injunctions, like the colonial legislatures that mandated new trials in completed litigation, Pet. at 9, 15, not only misstates the effect of the PLRA but also appears to be an attempt to revive an argument that petitioners abandoned before the *en banc* hearing in *Benjamin III*, namely, the assertion that the PLRA prescribes a rule of decision in particular cases in violation of the rule of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). *See Benjamin III*, 172 F.3d at 159. This assertion should be disregarded.

written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right" and if the court makes the other findings set forth in the statute. 18 U.S.C. § 3626. Indeed, the termination provision of the PLRA is not even triggered unless a defendant affirmatively moves to terminate a decree, which would be counterproductive unless the defendant believed in good faith that conditions in its correctional facility were constitutional.

Nor does the PLRA create its own *raison d'être* merely by altering the law concerning the "reopening of judgments", as petitioners suggest. Pet. at 14. The PLRA is not "a law overturning injunctions", *id.*; rather, by its passage Congress changed the law of remedies by imposing the requirement of a finding of a constitutional violation in order to warrant prospective injunctive relief in prison litigation. Thus, defendants in prison litigation are no longer limited to the relief afforded by Federal Rule of Civil Procedure 60(b)(5) to seek modification of injunctive decrees. When Congress established new standards for the termination of injunctive relief in prison litigation under § 3626, it facilitated the appropriate revision or termination of relief in conformity with *Board of Education v. Dowell*, 498 U.S. at 247-50, and *Freeman v. Pitts*, 503 U.S. at 491. Petitioners' reliance on Rule 60(b)(5) and on *Dowell* and *Freeman*, *see* Pet. at 11-12, is therefore inapposite.

Finally, whether or not "scores of bills" were introduced before the passage of the PLRA to nullify "politically unpopular federal judicial action" in various areas, Pet. at 18, the fact remains that no such bill was enacted prior to the PLRA, and none has been enacted since the PLRA was passed over three years ago, despite

petitioners' vague unfounded assertion that "one can expect further efforts to curtail the judiciary's actions on behalf of other unpopular constituencies and causes." *Id.* Indeed, one of the two academic sources that petitioners cite to support their assertion of imminent, legislatively induced chaos in fact affirms Congress's authority to adjust available remedies, as long as it does not thereby prevent vindication of a constitutional right. *See* Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 527, 531 (1974); 18 U.S.C. § 3626(b)(3).[13] As the PLRA expressly retains remedies for constitutional violations, it meets this standard.

In summary, as the court below noted,

> In the PLRA, Congress has neither defined nor altered the federal rights that may be vindicated in prisoner litigation. Nor has it forbidden the court, if it finds a violation of federal right, to order or enforce such relief as the court finds is needed to remedy the violation of that right. The Act's termination provision simply forbids the continuation of prospective relief that exceeds what is needed to remedy a continuing violation of the federal right. . . .

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[13] "Congress . . . may enact any jurisdictional statute that does not prevent vindication of a constitutional right "and, "[a]s long as the federal rights involved in a case can be adequately vindicated in some manner, Congress may adjust the available remedies with impunity." Eisenberg, *supra*.

> The Act's elimination of the parties' ability to obtain judicial enforcement of the forward-looking provisions of a judgment obtained without such adjudication [of the merits of plaintiffs' claims or of the appropriate scope of the remedy] neither affects the court's power "'to say what the law is' in particular cases and controversies," *Plaut*, 514 U.S. at 218 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177), nor infringes "litigants' right to have claims decided before judges who are free from potential domination by other branches of government," *Commodity Futures Trading Commission v. Schor*, 478 U.S. at 848.

Benjamin III, 172 F.3d at 163-64. The PLRA does not violate Article III principles of separation of powers.

B. Section 3626(b) Is Consistent With Petitioners' Due Process And Equal Protection Rights

"Plaintiffs' remaining constitutional contentions [regarding claimed due process and equal protection violations] do not require extended discussion." *Benjamin III*, 172 F.3d at 164.

1. Due Process

It is established that, although a consent decree borrows elements from both judgment and contract, "the provisions of a consent decree that order prospective relief remain subject to modification or alteration for changes in

law or circumstances." *Benjamin III*, 172 F.3d at 164. As this Court noted in *System Federation*, principles of contract do not constrain a court's consideration of the modification of a consent decree:

> We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act. . . . [I]n truth what was then adjudged was *not* a contract as to any one. The consent is to be read as directed toward events *as they then were*. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.

364 U.S. at 651, *quoted in Benjamin III*, 172 F.3d at 164 (emphasis added). As consent decrees do not create vested rights, the PLRA does not deprive plaintiffs of any property rights. This principle has been acknowledged by each Circuit that has considered the issue. *See cases cited at* 1 n.2.

Plaintiffs rely on inapposite precedent. *Tonya K. v. Board of Educ.*, 847 F.2d 1243 (7th Cir. 1988), for example, *cited in* Pet. at 21-22, is limited by its facts to money judgments -- in that case, relating to attorneys' fees -- and does not apply to injunctive judgments with prospective application. Such injunctive judgments, like the Consent Decrees, do not have the finality required to establish vested rights any more than they are final for separation of powers purposes. *See Benjamin I*, 935 F. Supp. at 356 ("The principle that parties have vested rights in a court judgment is essentially the due process analog of

the separation-of-powers doctrine discussed in *Plaut*") (citing, *inter alia*, *Tonya K.*, 847 F.2d at 1247).

Petitioners also miscite *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442 (1998) (*per curiam*), *cited in* Pet. at 23, in which this Court held that courts may not deprive litigants of an apparently available statutory remedy, in that case a post-payment tax refund. The PLRA does not deprive plaintiffs of a remedy; rather, it requires them to show a violation of a federal right that warrants a remedy. This hardly constitutes deprivation of property without due process. And *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), *cited in* Pet. at 22-23, is a procedural due process case that has nothing to do with vested rights but instead concerns state-created procedural entitlements. Unlike the implementation of the state claims handling procedure struck down in *Logan*, the PLRA is not arbitrary; it affects only prospective relief and not finally determined rights; and, as previously noted, it mandates a procedure for retaining remedies for constitutional violations.

2. Equal Protection

As petitioners concede, they are not members of a protected class. As they also apparently concede, the statute does not burden a fundamental right,[14] and strict scrutiny therefore is not the appropriate level of review. Pet. at 26. Nor do petitioners appear to argue that § 3626(b) fails the traditional rational basis test. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (legislative classification "must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"). Rather, petitioners seek to invoke a "heightened" level of rational basis review, based on Congress' claimed "*attempt*[] to burden a disfavored -- though not suspect -- class's ability to employ the remedial mechanisms of society to protect itself and its constitutional rights." Pet. at 26 (emphasis added). Petitioners rely on *Romer v. Evans*, 517 U.S. 620 (1996), as support for the application of this "heightened" level of scrutiny; on the contrary, *Romer* applied traditional minimal scrutiny. *Id.* at 631-32. This purported analogy to *Romer* was expressly rejected by the Panel and District Court below, *Benjamin II*, 124 F.3d at 175, Pet. at 127a; *Benjamin I*, 935 F. Supp. at 353-54, Pet. at 174a-176a, as well as by other Courts of Appeal. *See Inmates of Suffolk County Jail*, 129 F.3d at 660-61; *Gavin*, 122 F.3d at 1090.

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[14] Petitioners do argue that "prisoners in this society" are unable to vote. Pet. at 26. They do not claim that they themselves are unable to vote, and there is nothing in the record below as to the right to vote of either petitioners -- who are pretrial detainees, not convicted prisoners -- or the class of "prisoners in this society", which includes convicted felons whose right to vote may be affected as a consequence of their convictions. The statement therefore should be disregarded.

Petitioners do not argue that the statute actually burdens their ability to obtain a remedy for any claimed violations of their constitutional rights. As the courts below and in the other Circuits have all concluded, § 3626(b) imposes no burden at all on prisoners' ability to obtain and enforce an appropriate remedy for the violation of their constitutional rights: "Nothing in the Act alters plaintiffs' federal rights or prevents the court from granting such relief as is necessary to remedy violations of those rights." *Benjamin III* at 164-65; *see also cases cited at* 1 n.2.[15] Rather, petitioners argue only that Congress should have legislated more broadly and had no rational basis for singling out prisoners' conditions litigation. Pet. at 26-27.

However, as the Court below concluded, "[t]he terms and legislative history of the Act make it clear that, *in the unique context of litigation challenging prison conditions,* . . . Congress adopted the remedial and termination provisions in order to promote, *inter alia*, principles of federalism and judicial restraint." *Benjamin III* (citing *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989); *Turner v. Safley*, 482 U.S. 78, 89 (1987)) (emphasis added). The Court found "unquestionably . . . legitimate" Congress's objective of "limiting the grant or continuation of prospective relief in this context to no more than what is found necessary to remedy the violation of a federal right." *Benjamin III*, 172 F.3d at 165; *accord, Imprisoned Citizens Union*, 169 F.3d at 189; *Inmates of*

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[15] The Equal Protection challenge was not before the Court of Appeals for the Sixth Circuit; however, that Court noted the decisions of the First, Second, Eighth, and Eleventh Circuits and stated that, were that challenge to the PLRA before it, "we would similarly reject it." *Hadix*, 133 F.3d at 943 n.3.

Suffolk County Jail, 129 F.3d at 660; *Dougan*, 129 F.3d at 1427; *Gavin*, 122 F.3d at 1090; *Plyler*, 100 F.3d at 374.

Petitioners have submitted no authority to the contrary, and have suggested no reason to overturn the decision below on this ground.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

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(3)

Supreme Court, U.S.
FILED
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No. 98-2042

IN THE

Supreme Court of the United States

JAMES BENJAMIN, *et al.*,

Petitioners,

—against—

BERNARD KERIK, Commissioner,
New York City Department of Correction, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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STATUTES

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No. 98-2042

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES BENJAMIN, et al.,

Petitioners,

against

BERNARD KERIK, Commissioner,
New York City Department of
Correction, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

ARGUMENT

Petitioners' petition for a writ of certiorari was docketed on June 22, 1999. After the petition had been mailed, the Court of Appeals for the Ninth Circuit issued its opinion in *Taylor v. United States*, Nos. 97-16069, 97-16071, 1999 WL 402748 (9th Cir., June 21, 1999) (en banc).[1] *Taylor* raised the same question

presented in the Petition for Certiorari in this case: the constitutionality of 18 U.S.C. § 3626(b), the judgment termination provision of the Prison Litigation Reform Act (PLRA), as applied to final judgments of Article III courts entered before the PLRA was enacted. The *Taylor* decision did not settle the constitutional question and has left the law in that Circuit in disarray on this important question. It therefore supports the need for this Court to grant the petition in this case and to clarify the important constitutional issues for courts and parties in all jurisdictions.

In *Taylor*, the defendant prison officials moved to terminate a December 1972 consent decree, and the plaintiffs cross-moved to declare § 3626(b) unconstitutional. The district court denied the defendants' motion and granted the plaintiffs' motion. *Taylor v. Arizona*, 972 F.Supp. 1239 (D.Ariz. 1997). On appeal, a panel of the Ninth Circuit affirmed, striking the statute down as invalid under the principle of separation of powers. It held that § 3626(b) improperly reopened the final judgments of Article III courts, citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and that it prescribed a rule of decision in violation of the rule of *United States v. Klein*, 80 U.S. (13 Wall) 128 (1872). *See Taylor v. United States*, 143 F.3d 1178 (9th Cir.), *rehearing granted, opinion withdrawn*, 158 F.3d 1059 (9th Cir. 1998). On rehearing *en banc*, however, the court by a 6-5 vote avoided the question of constitutionality by holding that the 1972 "consent decree" addressed in the parties'

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[1] The *Taylor* decision appears in the Appendix ("App.") to this brief.

motions was in fact an interlocutory order that was no longer effective, and declaring the defendants' motion to terminate moot. It declined to construe the motion as addressed to the actual judgment in the case, entered in 1973, in part to avoid unnecessary decision of the constitutional question. App. 12a-16a.

Having said that, however, Judge Rymer's majority opinion went on in § II.B to respond to arguments made in the dissenting opinion that the statute is constitutional and should have been applied to the 1973 judgment. App. 16a-23a. Judge Tashima declared these remarks dicta and disassociated himself from them in an opinion concurring in the result. App. 24a. As a result, § II.B of Judge Rymer's opinion does not represent the views of a majority; the court was divided 5-5 on those issues.

Judge Rymer's opinion, though it purported to distinguish the instant case and others like it, in fact supports the separation of powers arguments made by Petitioners herein, as shown below. Since the earlier panel, consisting of two Ninth Circuit judges and a judge of the Court of International Trade, had struck down the statute altogether on those grounds, there is a substantial split in that Circuit on the issues that Petitioners bring to this Court for resolution.

Judge Rymer distinguished the 1973 judgment in *Taylor* from the judgments at issue in this and other appellate decisions upholding § 3626(b) by stating that the district court did not retain jurisdiction and the judgment did not require defendants to report on compliance, request permission to make changes, or return to court for any purpose. ". . . [T]he judgment, in short, was executed. The case is over." App. 16a (footnote omitted). Under these circumstances, application of § 3626(b)(2) "would both subject a final judgment 'to a reopening requirement which did not exist when the judgment was pronounced,' *Plaut*, 514 U.S. at 234, and direct reversal of a final determination of

the Judicial Department. That Congress may not do." App. 21a.

Thus, half the judges of the *en banc* court would hold § 3626(b) unconstitutional as applied at least to some equitable judgments in prison conditions litigation.

The distinction between judgments that explicitly retain jurisdiction and require further judicial involvement and those that do not is untenable. As the *Taylor* dissent acknowledges, *see* App. 34a and n. 7, district courts retain jurisdiction in any case to enforce or modify their judgments. *Root v. Woolworth*, 150 U.S. 401, 411 (1893). No formal reservation is necessary. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). The parties may return to court for enforcement, and must return to court if they seek modification of the judgment's terms, as the defendants in *Taylor* did repeatedly. App. 34a-35a. That is true regardless of whether the judgment spells that obligation out.[2]

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[2] Judge Rymer's opinion, while disavowing any view about judgments involving "ongoing court supervision and enforcement," App. 22a-23a, can be read to suggest that an injunctive judgment that in terms retains jurisdiction or provides for monitoring or reporting is not a final judgment and for that reason is not protected by the rule of *Plaut v. Spendthrift Farms, Inc.*, *supra*, from legislative reopening. (The dissenting opinion states this proposition explicitly. App. 50a.) Such a distinction would be untenable for the reason already stated: courts may enforce judgments, and litigants must obey them, regardless of whether the judgment says so in terms. Moreover, the presence of such terms in a judgment may have nothing to do with the actual course of proceedings, since monitoring or reporting requirements may be imposed after the entry of judgment if controversies arise about compliance with the judgment.

Thus, the *Taylor* majority holding cannot rationally be limited to injunctive judgments that share the peculiar characteristics of the *Taylor* judgment.[3] As a practical matter, then, the judges of the Ninth Circuit *en banc* court are divided evenly on the question presented in the Petition in this case. Since two more Ninth Circuit judges, who sat on the *Taylor* panel but not on the *en banc* court under the Ninth Circuit's rules, voted to strike the statute down, seven of that court's judges are committed to a rationale that would invalidate the statute. In the wake of *Taylor*, the court has called for supplementary briefing in two cases that had been postponed pending decision in *Taylor*, which will be heard by a panel, with inevitable requests for *en banc* reconsideration to follow.[4]

The *Taylor en banc* decision reveals a deep division among judges in one circuit concerning the reach

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[3] The dissent, by referring exclusively to consent judgments, implies a distinction, which is insupportable, between consent judgments and those entered after contested litigation. There is no difference between litigated injunctions and consent judgments for purposes of post-judgment proceedings. *United States v. Swift*, 286 U.S. at 114-15. Nor is there a difference for separation of powers purposes. "It is a judicial function and an exercise of the judicial power to render judgment on consent." *Pope v. United States*, 323 U.S. 1, 12 (1944). Nor is there anything in § 3626(b) that supports a distinction between consent decrees and litigated judgment.

[4] *Gilmore v. California*, No. 98-15198, Order (9th Cir., July 1, 1999); *Thompson v. Enomoto*, No. 98-15160, Order (9th Cir., July 1, 1999). The panel will include one judge who dissented in *Taylor*, one judge who has not participated either in the panel or *en banc* proceedings in *Taylor*, and one senior judge from the Eighth Circuit sitting by designation.

of the *Plaut* finality principle and simultaneously illustrates substantial open questions about the nature of finality in injunctive cases and the power of Congress directly to dictate the fate of court orders. (Even the dissenting judges in *Taylor* conceded that Congress's authority to reopen consent decrees presents a "difficult" question and that "neither [*Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856)] nor *Plaut* is completely instructive on this weighty issue." App. 50a.) These questions are at the heart of the separation of powers issue in this case as well. They are important both for the fate of the Prison Litigation Reform Act and more generally for the courts' and Congress's understanding of the judiciary's powers and their limits. The Court should grant certiorari in this case to resolve them.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Dated: New York, New York
July 12, 1999

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDDIE WILLIE TAYLOR;
MICHAEL F.X. HOGAN,
Plaintiffs-Appellees,

v.

Nos. 97-16069
97-16071

UNITED STATES OF AMERICA,
Intervenor-Appellant,

D.C.Nos.
72-00021-RCB and
72-00058-RCB

STATE OF ARIZONA; TERRY STEWART,

Director of the Arizona
Department of Corrections, et al.,
Defendants-Appellants.

Appeals from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted March 9, 1998
Decided May 4, 1998

Rehearing En Banc Granted and
Opinion Withdrawn November 3, 1998

Argued and Submitted
January 21, 1999—San Francisco, California

Filed June 18, 1999

Before: Proctor Hug, Jr., Chief Judge, and
David R. Thompson, Ferdinand F. Fernandez,
Pamela Ann Rymer, Andrew J. Kleinfeld,
Michael D. Hawkins, A. Wallace Tashima,
Sidney R. Thomas, Barry G. Silverman, Susan P. Graber,
Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge Rymer; Concurrence by Judge Tashima;
Dissent by Judge Wardlaw; Dissent by Judge Graber

OPINION

RYMER, Circuit Judge:

The en banc worthy issue in this case is whether the "immediate termination" provision of the Prison Litigation Reform Act of 1995 (PLRA), 18 U.S.C. § 3626(b)(2), runs afoul of separation of powers principles. However, we do not need to reach this question because the motion that is before us—"to terminate the consent decree entered in this case on December 22, 1972"—is moot because the December 22, 1972 order (regardless of its label) was interlocutory and disappeared when the final judgment was entered October 19, 1973. We therefore do not have to, and so should not, resolve the

constitutionality of the "immediate termination" provision at this time.

But if this is wrong and Arizona is somehow entitled to proceed, then the constitutionality of § 3626(b)(2) can only be decided in the context of the actual judgment that was entered in this action. That judgment could not be more final. It simply approves rules and restoration of individual good time credits that the parties agreed upon and that were basically in place; the judgment contains no ongoing, monitoring, reporting, enforcing, or oversight provisions. It does not look, walk or quack like an injunction. On several occasions the court explicitly disavowed any intention of trying prospectively to manage prison administration, and in its 1973 judgment the court did not retain jurisdiction for any purpose. Indeed, the judgment declares "[t]hat all relief sought by plaintiff members of the class heretofore designated to which they are entitled is granted by this Judgment and that the class, collectively and individually, is entitled to no other relief under this action." As such, the judgment ended this case. It cannot be that twenty-five years later, Congress may redefine "relief" in such a way that it retroactively converts a judgment which on its face ends an action into one that grants "prospective relief" such that it now must be reopened and terminated. Regardless of the constitutionality of applying § 3626(b)(2) to pre-PLRA consent decrees that *do* put injunctions in place to govern prisons prospectively, applying the "automatic termination" provision to the *Taylor* judgment subjects it to reopening conditions that did not exist when it was entered. There is no opinion of which we are aware that would say this is not an unconstitutional incursion on judicial power.

We accordingly affirm denial of the motion to terminate

the December 22, 1972 consent decree on the ground that it was moot, but under no circumstances would we reverse on the merits as the dissent indicates we should.

I

In early 1972, two inmates at the Arizona State Prison in Florence, Arizona, Eddie W. Taylor and George Yanich, Jr. (collectively "Taylor"), petitioned the United States District Court for the District of Arizona for writs of habeas corpus under 28 U.S.C. § 2254 and for damages under 42 U.S.C. § 1983.[1] The two related cases were consolidated. In pertinent part, Taylor challenged on a class-wide basis Arizona's inmate behavior and discipline rules and procedures, and deprivation of "two-for-one good behavior time " (Count Three).[2] Taylor took discovery and the court conducted evidentiary hearings on May 26 and November 10, 1972. In the middle of the first hearing (on Taylor's motion for interlocutory relief pending trial), the parties stipulated that "[t]he disciplinary procedures of the prison leave something to be desired to comply with constitutional standards," and agreed "to negotiate over proper disciplinary standards and procedures to the end of seeking

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[1]Named as defendants were the State of Arizona; Walter G. Jacobs, Chairman of the Board of Pardons and Paroles; Allen Cook, Director of the Department of Corrections; Frank A. Eyman, Warden of the Arizona State Prison; A. G. Jiminez, a prison Guard Captain; and Solomon Madril and Pablo Lopez, two prison Correctional Officers.

[2]The named plaintiffs changed over time, but for convenience we shall refer to the class throughout as Taylor.

agreement."[3] Settlement negotiations proceeded over the following months and, after additional briefing, the court held another hearing November 10 to discuss their progress. Approximately one month later, the parties lodged an agreement which the district court adopted in a Memorandum and Order filed December 22, 1972. Describing the background, the court observed:

> These two class action cases were originally consolidated for trial and counsel was appointed to represent plaintiffs. Twice evidentiary hearings were commenced. Each time the hearings were adjourned prior to completion due to compromise, agreement or stipulation of counsel making further testimony unnecessary. Because of agreements of counsel which prevented a full trial of all issues, findings of fact and conclusions of law are not appropriate.

The court then said of the stipulation:

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[3]This stipulation was read into the record during the May 26 hearing and subsequently memorialized in a June 2, 1972 Stipulation and Order. The parties also agreed to return Taylor to the general inmate population, restore his suspended two-for-one credits, and to sever Yanich's damages claim. Taylor and Yanich's remaining damages claims and a claim (also pled as a class action) pertaining to prison living conditions, were disposed of in the court's December 22, 1972 order.

> The following order is in the form stipulated to by counsel for both sides and approved by the Court to dispose of Count 3, the class action attacking the constitutionality of the prison's disciplinary rules, regulations and conditions of special confinement. All the provisions of the following order were agreed upon by counsel for both sides in consultation with their named clients . . . . In view of the manner in which the case has arrived at this stage, the Court, at this time, indicates no opinion as to the constitutionality of the prior rules and regulations either as written or as applied.

The order outlined procedural and substantive rules for the administration of prison discipline that had been agreed upon by the parties; required the parties to prepare and submit revised rules within 90 days;[4] allowed Taylor to present exceptions; indicated that the court would "adjudicate any appropriate issues, and will declare the resultant rules as generally suitable for use and application until changed"; and "retain[ed] jurisdiction to review this procedure within six (6) months to determine that it is operating properly." It also provided for review of disciplinary records that would result in an order adjusting good time credits that would be res judicata as to the rights of the parties.

Over the next few months the parties completed their negotiations as contemplated in the December 22 Order. On

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[4]This deadline was later extended to July 25. 1973.

July 25, 1973, Arizona prison officials submitted their final draft of the "Prisoner Rules, Regulations and Discipline Program of the Arizona State Prison," and Taylor simultaneously filed six objections to specific provisions of the proposed Rules. The court held a hearing on August 2, 1973 to resolve Taylor's objections, at the outset of which it observed, "the responsibility for drafting administrative rules is not on the Court. The Court's only function is to review rules that have been drafted by the administration, to determine whether they meet minimum constitutional standards and whether they are applied constitutionally, that is, evenly and fairly to everybody." On August 27, the court issued a Memorandum and Order denying all but one of Taylor's objections (requiring a hearing prior to revocation of probation that may result in loss of accrued good-time credits). In so doing, it stated:

> It is recognized that it is neither the duty nor the prerogative of this Court to dictate rules and regulations for the prison. The Court's responsibility is only to insure that the disciplinary rules on their face and as applied provide minimal due process as required by the Constitution and that their provisions do not violate the constitutional prohibitions against cruel and unusual punishment. It is recognized that persons may differ in their opinions as to the desirability, propriety or effect of different procedures or different standards of punishment, but the test to be applied by the Court is that of minimum constitutional compliance.

The order approved the "Prisoner Rules, Regulations and Discipline Program of the Arizona State Prison" Final Draft

with the exception noted. Counsel were ordered to prepare a proposed amendment, and the court retained jurisdiction "as indicated in previous orders solely for consideration of objections, if any, to the appeals procedure as administered, for final settlement of two-for-one time restoration, and for consideration of the above-indicated amendment."

The parties filed a stipulation October 19, 1973 reflecting agreed changes to the Final Draft as well as the one ordered change, and the "final settlement" of two-for-one time restoration. On the same day, judgment was entered in Taylor's favor. The judgment recognizes that the "class herein includes all inmates who were and are serving sentences at the Arizona State Prison during the pendency of this action, as heretofore ordered by the Court and through the date of this judgment. . . ." It approves the Prisoner Rules, Regulations and Discipline Program attached as an exhibit and incorporated by reference. It directs the Arizona State Prison to adjust immediately the respective inmate release dates in accordance with the settlement of two-for-one time restoration stipulated by the parties. And the judgment provides "[t]hat all relief sought by plaintiff members of the class heretofore designated to which they are entitled is granted by this Judgment and that the class, collectively and individually, is entitled to no other relief under this action."

Taylor filed a "pro forma" motion for a new trial October 23, 1973 in order to give counsel an opportunity to inform the prisoners that a final judgment had been entered. It was denied November 6. No appeal was taken.

In November 1979, Arizona moved to modify the October 19, 1973 judgment pursuant to Fed. R. Civ. P. 60(b) to

substitute new "Disciplinary Rules for the Arizona Department of Corrections" for the 1973 prison rules and regulations. The court found that the new rules "on their face[ ] meet minimal constitutional standards" and approved them. Arizona filed another motion pursuant to Rule 60(b)(5) on January 6, 1994, this time "for a modification of the consent decree entered in this matter in 1972" in order to permit the Prison System to adopt a new disciplinary system. This motion was summarily granted on February 24, 1994; however, two members of the class acting pro se moved on January 18, 1995 to vacate the February 24, 1994 order on the ground that they were not given notice of Arizona's motion. Judge Copple, to whom the matter had originally been assigned, recused himself and it was reassigned to Judge Broomfield, who on March 21, 1997 vacated the February 24, 1994 order on due process grounds but stayed that order pending consideration of Arizona's now-revived Rule 60(b)(5) motion.[5]

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[5]This motion remains in abeyance, as no further substantive activity has occurred in the district court since this appeal was taken from the March 21, 1997 order that also held the "immediate termination" provision of the PLRA unconstitutional. In the March 21, 1997 order, the district court gave Arizona thirty days to file "an amended petition to modify or terminate the consent decree under Rule 60(b)(5) or a notice of election not to file an amended petition." The record reflects that Arizona filed a supplement to its 1994 motion, with additional authority, but has neither amended the petition to seek to terminate the decree nor filed an election not to. The fact that this motion to modify is still pending does not appear to moot or otherwise affect resolution of this appeal, having to do, as it does, with a motion to terminate under the PLRA.

Meanwhile, on September 3, 1996 Arizona moved "to terminate the consent decree entered in this case on December 22, 1972, and modified by Order filed February 24, 1994, pursuant to Fed. R. Civ. P. 60(b) of Civil Procedure and 18 U.S.C. § 3626(b), the Prison Litigation Reform Act."[6] The district court denied the September 3, 1996 motion to terminate, and granted Taylor's motion to declare § 3626(b)(2) of the PLRA unconstitutional. *See Taylor v. Arizona*, 972 F.Supp. 1239, 1249 (D. Ariz. 1997). It is this ruling that Arizona (joined by the United States) appeals.

However, as discussed in n.10, *infra*, a motion pursuant to Rule 60(b) to terminate the "consent decree" (if there were one that is still alive), or for relief from the judgment, might have the effect of making it unnecessary to reach the separation of powers issue posed in this case.

[6]On August 5, 1996 the Arizona Constitutional Defense Council (CDC) filed a motion in the name of the State of Arizona (as it was authorized by state law to do at the time) to terminate injunctive relief and dismiss the case. The Attorney General distanced himself from these papers, and eventually the Arizona Supreme Court ruled that the statute empowering the CDC to pursue legal actions in the name of the state was unconstitutional. Before that decision was rendered, however, the district court allowed the CDC to participate as amicus curiae but rejected its position that even if the PLRA were unconstitutional, Arizona is entitled to a termination of the decree because it complied in good faith and there was no violation of a constitutional right. That ruling is not before us on appeal.

II

Arizona argues that the PLRA's termination provision does not violate the separation of powers doctrine because, rather than retroactively reopening a final judgment, it merely establishes conditions for continuing prospective injunctive relief enforced against a state by a federal court. It maintains that the consent decree in this case is not "final " because it is subject to ongoing judicial monitoring and, when necessary, termination either by judicial or statutory authority. Because the decree is not final, Congress may restrict the prospective remedial jurisdiction of the federal courts.

Similarly, the United States points out that this case involves application of the PLRA's termination provisions to prospective relief, not to a money judgment, and argues a "final" prospective order does not represent "the last word of the judicial department with regard to a particular case or controversy." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995). Since a court always possesses the power to revisit continuing prospective orders in light of the evolving factual or legal landscape, and to modify or terminate the relief, it does not offend separation of powers principles to require a court today, when deciding whether to continue, modify or terminate its prospective orders, to apply the standards set forth under current federal law—the PLRA. Further, according to the government, Congress has authority under Article I to regulate and restrict the injunctive powers of the federal courts unfettered by common law standards established by the Supreme Court for considering a request to modify or terminate a consent decree, *see Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992), and has properly exercised that power in the PLRA.

Taylor responds that a consent decree imposing prospective relief is a final judgment, *see id.* at 391; Congress may not subject final judgments to new reopening requirements, *see Plaut*, 514 U.S. at 234; and the PLRA fails separation of powers analysis to the extent it goes beyond merely setting standards to apply to judgments rendered in the future, seeking instead to reopen judgments already final and to condition their viability on new standards. He disagrees with Arizona and the United States that *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (*Wheeling Bridge II*) controls, since Congress has not altered the substantive law upon which the judgment in this case was based. In any event, Taylor contends, the fact that courts may reopen final judgments under the equitable standards in Rule 60(b) does not mean that Congress can impose a mandate to reopen for other reasons.

We see the issue somewhat differently from either party. They fix on the separation of powers impact of the PLRA on a "consent decree" supposedly entered December 22, 1972. However, the December 22, 1972 order is not the judgment. The judgment is what counts, and it neither refers to nor incorporates the December 22, 1972 order. Therefore, whether there is a separation of powers problem that we must confront and if so, the framework for its analysis, must start (and so far as we are concerned, also stop) with the October 19, 1973 judgment.

A

[1] There is no way to read the December 22, 1972 order as itself being a final order, independent of the judgment entered ten months later. On its face it contemplated further

negotiations. While the court did retain jurisdiction, it did so only for six months and only for limited purposes while the parties continued to finalize their settlement.[7] Although Arizona refers to this order as a "consent decree, " it doesn't look like one to us. Rather, it appears to be a case management order (reflecting the parties' stipulation) about how to proceed to dispose of Count Three. It summarizes agreements in principle about the new rules, sets deadlines for submitting revised rules, and establishes a process for making and resolving objections. Regardless, even if the December 22, 1972 order were a "consent decree," the judgment does not mention it. The judgment does specifically incorporate by reference—and attaches as exhibits—the Prisoner Rules, Regulations and Discipline Program, as well as the settlement of two-for-one time restoration and release dates for current inmates, but no other documents. Thus, the judgment itself leaves no doubt that the December 22, 1972 "consent decree" was *not* part of the relief that was granted. This makes sense, as

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[7]In fact, the August 27, 1973 order effectively superseded the December 22, 1972 order, as the later order addressed proposed new rules submitted pursuant to the prior order. The court recognized a number of changes that had taken place within the Department of Corrections, reiterated that "it is neither the duty nor the prerogative of this Court to dictate rules and regulations for the prison," and resolved disputes about a few of the proposed provisions. The court also retained jurisdiction "as indicated in previous orders" solely to consider objections to the appeal procedure as administered, final settlement of good time credits, and consideration of an amendment to the Final Draft rules. All of this occurred before final judgment was entered in October.

the December 22, 1972 order was but a work in progress.

[2] Arizona's motion under the PLRA to terminate the "consent decree" entered December 22, 1972 is accordingly moot.[8] There is no December 22, 1972 consent decree left to be terminated, for once judgment was entered, the December 22, 1972 interlocutory order (whatever its label) disappeared.[9] It was automatically terminated by the judgment. This means that the district court had no live motion before it. For this reason we affirm denial of Arizona's motion, albeit on different

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[8]The motion seeks to terminate the "consent decree entered in this case on December 22, 1972, and modified by Order filed February 24, 1994." The February 24, 1994 order is the order that the district court vacated on due process grounds. However, this has no bearing on the viability of Arizona's PLRA motion because the Prisoner Rules, Regulations and Discipline Program that were modified in 1979 and that Arizona sought to modify again in 1994 were approved in the *judgment*—not the December 22, 1972 order.

[9]*Cf., e.g., Teamsters Joint Council No. 42 v. Int'l Brotherhood of Teamsters*, 82 F.3d 303, 307 (9th Cir. 1996) (judgment on the merits moots preliminary injunction); *Securities & Exchange Comm'n v. Mount Vernon Mem'l Park*, 664 F.2d 1358, 1361-62 (9th Cir. 1982) (applying "long recognized" doctrine that the propriety of preliminary relief merges into a decision on the merits); *Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141, 144 (2d Cir. 1977) ("With the entry of the final judgment, the life of the preliminary injunction came to an end, and it no longer had a binding effect on any one.").

grounds from the district court's.

[3] We recognize that this may seem futile, as Arizona can simply file another motion to terminate relief granted in the judgment, or even urge that its present motion be so construed. We nevertheless decline to do so, for two reasons. First, the arguments have proceeded on the assumption that the court made prospective orders and retained jurisdiction—which it did in the December 22, 1972 order but which it did not do in the final judgment. These arguments are largely beside the point in light of the actual judgment that was entered October 19, 1973. The second, related reason is the importance of avoiding a constitutional issue where possible. To uphold denial of Arizona's motion on mootness grounds obviously serves this salutary purpose.[10] In addition, the separation of powers issue is so serious in this particular case that the parties—and the decision with respect to it—must focus directly on the judgment. If this is done, the question becomes whether Congress may require a United States district court to reopen,

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[10]This would also afford the district court an opportunity on remand to consider whether a motion to terminate under § 3626(b)(2) should first be construed and considered as a motion under Rule 60(b). If the court were to find, for example, that the October 19, 1973 judgment had been discharged it could relieve Arizona of the final judgment pursuant to Rule 60(b)(5). Or if it were to find that the judgment was indeed a "consent decree with prospective application," but that it would be inequitable to continue giving it prospective effect on account of a significant change in factual conditions or law, it could reopen and revise it under *Rufo*. Either way, the need to apply the PLRA's "immediate termination" provision might be averted.

reconsider and terminate a final judgment (which leaves nothing more for the district judge to do) under standards that were not in existence when the judgment was entered and became final.

B

Although reluctant to do so, we now turn to that question because the dissent has addressed a different one, and it cannot be correct that the PLRA's "immediate termination" provision may constitutionally be applied to the Taylor judgment. The judgment itself leaves no doubt that it left nothing more for the district court to do. Its terms could not be clearer: "[A]ll relief sought by plaintiff members of the class heretofore designated to which they are entitled is granted by this Judgment and [ ] the class, collectively and individually, is entitled to no other relief under this action." Period.

The court did not retain jurisdiction, as it could have done. Nor does the judgment require Arizona to report on compliance, request permission to make changes, or return to court for any purpose, as it also could have done. Unlike cases where a consent decree does put an injunctive scheme in place and the court retains jurisdiction to enforce it, here the judgment explicitly granted all the relief to which Taylor was entitled. That relief does not include continuing jurisdiction. Indeed, so far as the record discloses, the rules were implemented and the credits were restored; the judgment, in short, was executed. The case is over.[11]

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[11]We disagree with the dissent's view that the district court had "continuing supervisory jurisdiction" or that Arizona

It is beyond dispute that the separation of powers principle forbids Congress from reopening the final judgments of Article III courts. *See Plaut*, 514 U.S. at 240. As the Court explained in *Plaut*:

> Article III establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments."

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availed itself of the court's "continuing supervisory jurisdiction" on several occasions. *See* Dissent at 6563-64 & n.7. The court did not have continuing supervisory jurisdiction because the October 19, 1973 judgment did not state that it was retaining jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381-82 (1994). Nor did Arizona invoke the court's continuing supervisory jurisdiction in November 1979 or January 1994, but instead filed a routine motion to alter or amend judgment under Rule 60(b). That Arizona chose to ask the court's blessing on revisions to the rules by moving pursuant to Rule 60(b) to modify the judgment, and was successful, is immaterial to the point that it was a final judgment because changing the rules did not require court approval.

Id. at 218-19 (citations omitted). Inasmuch as "[j]udicial jurisdiction implies the power to hear and determine a cause," *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 647 (1874), once court decisions achieve finality they "may not lawfully be revised, overturned or refused faith and credit by another Department of Government." *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Congress violates this fundamental principle by retroactively commanding the federal courts to reopen final judgments, which is precisely what Congress will have done if the PLRA's "immediate termination" provision is applied to the *Taylor* judgment.

In a nutshell, Congress may change the law and, in light of changes in the law or facts, a *court* may decide in its discretion to reopen and set aside a consent decree under Fed. R. Civ. P. 60(b), *see Rufo*, 502 U.S. at 383-84, or refuse to enforce an executory decree pursuant to its inherent power, *see Wheeling Bridge II*, 59 U.S. (18 How.) at 431-32, but Congress may not *direct* a court to do so with respect to a final judgment (whether or not based on consent) without running afoul of the separation of powers doctrine. *See Plaut*, 514 U.S. at 227, 234-35.

Congress in fact changed the law in § 3626(a) so that "prospective relief" with respect to prison conditions shall now extend no further than necessary to correct violation of a federal right and may not be granted at all unless the court finds that the relief is narrowly drawn, extends no further than necessary, and is the least intrusive means necessary to correct the

violation.[12] Subsection (a) creates no problem in this case. Presumably under *Rufo*, a prison subject to injunctive relief could invite a court pursuant to Rule 60(b) to revisit a pre-PLRA consent decree on the basis of this change in law, and might prevail if it could show that continued enforcement was inequitable.[13] However, § 3626(b)(2) *mandates* reopening

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[12]18 U.S.C. § 3626(a) (West Supp. 1999), titled "Requirements for relief," provides in relevant part:

> (1) Prospective relief.—
>
> > (A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

[13]The Court made clear in *Rufo* that even under Rule 60(b) "[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor." *Rufo* , 502 U.S. at 391. Thus, even if the *Taylor* judgment is a "consent decree" under the PLRA's definition, the congressional directive to terminate it unless it is the minimum necessary to

and requires the immediate termination of "any prospective relief" that was approved or granted in the absence of the findings set out in (a)(1), whether before or after the PLRA's enactment, unless the court finds that the "prospective relief" remains necessary to correct an ongoing violation and extends no further than necessary, is narrowly drawn, and is the least intrusive means.[14] In addition, the Act defines "prospective

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correct a violation goes well beyond the reopening possibilities that the parties could reasonably have expected in 1973. As such, the PLRA definition of a "consent decree" would itself be impermissibly applied retroactively if its effect were to make the *Taylor* judgment anything other than a final judgment "that may be reopened only to the extent that equity requires" pursuant to Rule 60(b) under *Rufo. Id.; see also Stone v. City and County of San Francisco*, 968 F.2d 850, 854 (9th Cir. 1992) (a consent decree is a final judgment even if the district court retains jurisdiction over the case).

[14]18 U.S.C. § 3626(b) (West Supp. 1999) provides in pertinent part:

> (2) Immediate termination of prospective relief.—In any civil action with respect to prison conditions, a defendant or intervenor *shall be entitled to the immediate termination of any prospective relief* if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the

relief" as "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7). Thus, the combined effect of §§ 3626(b)(2) and (g)(7) is retroactively to make any judgment that does not award monetary damages "prospective relief" subject to immediate termination. Obviously the *Taylor* judgment awards no money damages, but it also left nothing for the court to do in the future. It simply approved credits that were res judicata and rules that were already in place (except for a reasonable time for printing and distribution of the substantive rules). It awarded no prospective equitable relief. Therefore, if somehow applied in this case, this legislation would both subject a final judgment "to a reopening requirement which did not exist when the judgment was pronounced," Plaut, 514 U.S. at 234, *and* direct reversal of a final determination of the Judicial Department. That Congress may not do. To our knowledge, no court has ever held otherwise.

In *Wheeling Bridge II*, the Court decided not to enforce an executory decree that directed removal of a bridge that had

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Federal right.

> Limitation.—Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation. (Emphasis added.)

previously been found to constitute an obstruction to navigation, after Congress (which was the authority competent to say so) made the bridge a post-road and thus, by definition, not an unlawful obstruction. 59 U.S. at 430. The important thing about *Wheeling Bridge II* is that it was the *Court* that made this decision, exercising *its* discretion, not Congress that directed the court to reopen and terminate, applying newly enacted standards.

Other circuits that have considered the "immediate termination" provision of the PLRA and held it constitutional have done so in cases involving comprehensive consent decrees that subject prison administrators to ongoing court supervision and enforcement. *See, e.g., Benjamin v. Jacobson*, No. 96-7957, 1999 WL 188240 at *1-2 (2d. Cir. Mar. 23, 1999) (en banc) (complex series of consent decrees which "generated a judicially administered structure comprising over ninety related court orders and extending to more than thirty discrete areas of prison administration"); *Imprisoned Citizens Union v. Ridge*, No. 98-1536, 1999 WL 93802 at *1 (3d Cir. Feb. 25, 1999) (district court retained jurisdiction over decree that governs nearly every aspect of prison management); *Hadix v. Johnson*, 133 F.3d 940, 941-42 (6th Cir.), *cert. denied sub nom. Hadix v. McGinnis*, _____ U.S. _____, 118 S. Ct. 2368 (1998) (consent decree addressed various aspects of prison life, including safety, sanitation, hygiene, and protection from harm that resulted in several remedial orders over the years); *Dougan v. Singletary*, 129 F.3d 1424, 1425 (11th Cir. 1997), *cert. denied*, _____ U.S. _____, 118 S. Ct. 2375 (1998) (highly detailed remedial order entered after court found prison officials in contempt for violating decree providing for exercise sessions); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 653 (1st Cir. 1997), *cert. denied*, _____ U.S. _____,

118 S. Ct. 2366 (1998) (1979 consent decree governed jail housing policies and inmate double-bunking under supervision of the court); *Gavin v. Branstad*, 122 F.3d 1081, 1083-84 (8th Cir. 1997), *cert. denied*, _____ U.S. _____, 118 S. Ct. 2374 (1998) (court retained jurisdiction to enforce terms of decree that contained detailed regulations governing a number of areas of prison life, and ordered compliance with supplemental agreements over which it also retained jurisdiction); *Plyler v. Moore*, 100 F.3d 365, 369 (4th Cir. 1996), *cert. denied*, 520 U.S. 1277 (1997) (consent decree contained measures to be taken to alleviate overcrowding and detailed provisions relating to health services, educational programs, vocational training, food service, and visitation over which court retained jurisdiction "to ensure that the Decree and all plans incorporated herein are fully implemented"). Without expressing a view one way or the other on cases such as these, it is clear that application of the "immediate termination" provision to the *Taylor* judgment is altogether different.

In sum, borrowing from *Plaut*, we "know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so." *Plaut*, 514 U.S. at 240.

III

[4] Because it is an act of Congress that is at stake on the one hand, but the integrity of a judgment and the independence of the judicial branch that is threatened on the other, we must be cautious in upholding, or overturning, the "immediate termination" provision of the PLRA. We do not

have to decide the separation of powers question in this case, since Arizona's motion to terminate the December 22, 1972 consent decree is moot and was therefore properly denied. However, inasmuch as the dissent would uphold § 3626(b)(2), we are also constrained to say we disagree that it can be constitutionally applied so as to require the district court to reopen and reconsider the *Taylor* judgment (which leaves nothing more for the district judge to do) under standards that were not in existence when the judgment was entered and became final.

AFFIRMED.

TASHIMA, Circuit Judge, concurring in part:

I concur in Parts I and II.A, and in the judgment. As the analysis in Part II.A is sufficient completely to dispose of this appeal, I view Part II.B as unnecessary *dicta* and decline to reach the issue of the constitutionality of the Prison Litigation Reform Act of 1995 in this case.

WARDLAW, Circuit Judge, with whom THOMPSON, KLEINFELD, SILVERMAN, and GRABER, Circuit Judges, join, dissenting:

In *Taylor v. United States*, 143 F.3d 1178, 1185 (9th Cir. 1998), a three-judge panel of this court affirmed the district court's invalidation of the termination provision of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 802,

110 Stat. 1321-65 (1996) (codified as 18 U.S.C.A. § 3626(b)(2)) (West Supp. 1999) ("PLRA" or the "Act"). We took this case *en banc* to consider whether *Taylor* would remain the law of the circuit. My colleagues affirm, albeit on different grounds than the now-vacated panel decision. Specifically, the majority "affirm[s] the denial of the motion to terminate the December 22, 1972 consent decree on the ground that it was moot." *Ante*, at 6539. In so holding, the majority today firmly entrenches the Ninth Circuit outside the judicial mainstream of PLRA interpretation. Worse, it effectively precludes Congress from limiting prospectively a discrete kind of federal district court expropriation of power from democratically-elected state governments.

The majority holding is precariously perched upon a mischaracterization of the "judgment" at issue, the consequences of which are nothing short of extraordinary. Indeed, under the approach espoused by the majority, consent decrees plainly providing prospective relief, but fortuitously labeled as "judgments" by district courts in this circuit remain forever beyond the reach of the PLRA's termination provision. Thus, when prison officials in the State of Arizona wish to alter such correctional niceties as the duration of inmate showers or library privileges, they must continue to seek the permission of a federal district judge in Phoenix, a practice they have endured for the past quarter century. As discussed *infra*, in reaching to avoid the constitutional questions before us today, the majority effectively has rendered the Act a historical nonoccurrence, at least in the Ninth Circuit. I cannot let such a ruling stand without dissent, and respectfully offer mine.

I

When Congress enacted the PLRA, it sought to oust the federal judiciary from day-to-day prison management.[1] To that end, the PLRA authorizes prison officials to return to district court for the immediate termination of prospective relief under existing district court consent decrees. Specifically, the Act entitles defendants in prison-condition lawsuits to:

> immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal

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[1]Although this court ordinarily essays legislative history with a skeptical eye, *see Lesnoi, Inc. v. Stratman*, 154 F.3d 1062, 1070 (9th Cir.1998); *see also Conroy v. Aniskoff*, 507 U.S. 511, 519, 113 S.Ct. 1562, 1567, 123 L.Ed.2d 229 (1993) (Scalia, J., concurring) (analogizing the use of legislative history to the act of entering a crowded cocktail party and looking over the heads of the guests for one's friends), Congress left no doubts about its intentions when it passed the PLRA. *See, e.g.*, 141 Cong. Rec. S14,419 (1995) (statement of Sen. Abraham) ("[N]o longer will prison administration be turned over to Federal judges for the indefinite future for the slightest reason."); *id.* at S14,418 (statement of Sen. Hatch) ("I believe that the courts have gone too far in micromanaging our Nation's prisons."); *see also* H.R. Conf. Rep. No. 104-378 at 166 (1995) (noting that by virtue of the PLRA, "[p]rior consent decrees are made terminable upon the motion of either party, and can be continued only if the court finds that the imposed relief is necessary to correct the violation of the federal right").

> right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C.A. § 3626(b)(2) (the "termination provision").[2] The supervising tribunal may refuse to terminate jurisdiction only if it makes written findings "that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C.A. § 3626(b)(3) (the "prospective relief provision").[3]

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[2]The definitional section of the PLRA provides, in pertinent part:

> (1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties . . .
>
> (7) the term "prospective relief" means all relief other than compensatory monetary damages . . .
>
> (9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees . . .

18 U.S.C.A. § 3626(g).

[3]The phrase "current or ongoing violation" was amended to provide "current and ongoing violation." Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, §

Although several district court judges have sustained inmates' constitutional challenges to the PLRA,[4] every federal appellate court to consider the question, other than this one, has upheld the constitutionality of the Act. *See Benjamin v. Jacobson*, No. 96-7957, 1999 WL 188240, at *21 (2d Cir. Mar. 23, 1999) (en banc) (holding that section 3626(b)(2) does not violate separation-of-powers principles); *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 188 (3d Cir. 1999) (same); *Hadix v. Johnson*, 133 F.3d 940, 942-43 (6th Cir.) (same), *cert. denied*, _____ U.S. _____, 118 S. Ct. 2368, 141 L. Ed. 2d 737 (1998); *Dougan v. Singletary*, 129 F.3d 1424, 1426 (11th Cir. 1997) (same), *cert. denied*, _____ U.S. _____, 118 S. Ct. 2375, 141 L. Ed. 2d 743 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 657-58 (1st Cir. 1997) (same), *cert. denied*, _____ U.S. _____, 118 S. Ct. 2366, 141 L. Ed. 2d 735 (1998); *Gavin v. Branstad*, 122 F.3d 1081, 1088-89 (8th Cir. 1997) (same), *cert. denied*, _____ U.S. _____, 118 S. Ct. 2374, 141 L. Ed. 2d 741 (1998); *Plyler v. Moore*, 100 F.3d 365, 371-72 (4th Cir. 1996) (same), *cert. denied*, _____ U.S. _____, 117 S. Ct. 2460, 138 L. Ed. 2d 217 (1997). Indeed, the Sixth Circuit's decision in *Hadix* overturned the last of the

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123(a)(2), 11 Stat. 2440, 2470 (1997). The amendment applies to pending cases but has no relevance for purposes of this appeal.

[4]These courts uniformly invalidated the PLRA on separation-of-powers grounds. *See, e.g., Glover v. Johnson*, 957 F. Supp. 110, 112 (E.D. Mich. 1997); *Hadix v. Johnson*, 947 F. Supp. 1100, 1112 (E.D. Mich. 1996); *Gavin v. Ray*, No. 4-78-CV70026, 1996 WL 622556, at *4 (S.D. Iowa Sept. 18, 1996).

recalcitrant district courts and momentarily harmonized federal law. Five months after *Hadix*, this court issued its now-vacated opinion in *Taylor*.

Although, as the majority correctly points out, the prison officials in the instant case moved to terminate the district court's December 22, 1972, order, that stipulated order was embodied in the district court's subsequent judgment of October 19, 1973. The October 19, 1973, "judgment" accomplished two things. First, it adopted and expressly incorporated the stipulated rules and regulations that would govern the Arizona State Prison in Florence, Arizona. Second, it provided prospective and ongoing relief in that the rules and regulations demanded compliance by the prison officials unless they returned to the district court to obtain modification. Because the majority opinion operates under the faulty premise that the relief embodied in the December 22, 1972, order "disappeared when the final judgment was entered on October 19, 1973," *ante* at 6538, I now recount the procedural background of this case in some detail to clarify the matter.

Like the litigation that passed before our sister circuits, this controversy originated with a class action brought under 42 U.S.C. § 1983 against a correctional institution. Inmates of the Arizona State Prison System (collectively, "the plaintiffs") filed complaints in 1972 against various state prison officials, alleging unconstitutional conditions of confinement. The consolidated amended complaint averred that the State of Arizona and individual defendants' predecessors in office (collectively, "the defendants") had violated the First, Eighth, and Fourteenth Amendments by adopting and enforcing unconstitutional disciplinary rules, denying prisoners procedural due process, unlawfully depriving prisoners of good

time credits, and subjecting prisoners who were placed in isolation to inadequate diets and degrading living conditions. During the first of two evidentiary hearings, the parties stipulated that "[t]he disciplinary procedures of the prison leave something to be desired to comply with constitutional standards" and agreed "to negotiate over proper disciplinary standards and procedures to the end of seeking agreement." Negotiations ensued, and after another evidentiary hearing, the defendants entered into an agreement with the plaintiffs. The agreement called for the defendants to adopt new rules of discipline and to restore good-time credits. The State did not admit liability.

The parties' stipulated agreement is encompassed in the district court's order of December 22, 1972. The agreement substantially bridged the divide that had separated the parties but left some disputed issues unresolved. The parties' agreement was not finalized until several months later when, on October 19, 1973, the district court ultimately adopted the finalized version of the rules and regulations that would govern the Arizona State Prison.

In the December 22, 1972, order, the district court emphasized in a prefatory paragraph that, "[b]ecause of agreements of counsel which prevented a full trial of all issues, findings of fact and conclusions of law are not appropriate." The court noted that "[a]ll the provisions of the following order were agreed upon by counsel for both sides." The court, "[p]ursuant to the stipulation and request of counsel," then ruled on both the substantive and procedural rules of the prison. As to the substantive rules, the court ordered:

1. The defendants, in consultation with

counsel for the plaintiffs, shall prepare and submit revised rules.

2. This submission shall be made within ninety (90)[5] days of this order.

3. The plaintiffs shall present exceptions, if any there be, to the proposed rules within thirty (30) days thereafter, or shall waive exceptions.

4. This Court will then adjudicate any appropriate issues, and will declare the resultant rules as generally suitable for use and application until changed.

As to the procedural rules, the December 22, 1972, order reflected the parties' accord on such divergent matters as inmate library privileges, exercise schedules, duration of showers, and entitlement to private counsel during disciplinary proceedings. The court stated that it retained jurisdiction for six months "to review the operation of the appeal system [Paragraph II.F.5]" and "to review [the stipulated disciplinary] procedure . . . to determine that it is operating properly [Paragraph II.D.5]." The court "indicate[d] no opinion as to the constitutionality" of these agreed-upon rules.

On July 25, 1973, the parties neared final consummation of their agreement. The defendants submitted to the district court a proposed final draft of the "Prisoner Rules, Regulations

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[5]The court later extended this deadline to July 25, 1973.

and Discipline Program of the Arizona State Prison." The plaintiffs simultaneously filed objections to specific provisions of the proposed rules. The proposed final draft stated that the rules had been developed "[i]n an effort to promote an orderly day to day operation of this Prison and to maintain the health, safety, security, and general welfare of the prisoners, the staff and others while carrying out these functions." The penultimate sentence of the proposed rules stated that "[t]he provisions herein are to take effect immediately upon final approval of the United States District Court for the District of Arizona."

Final approval came on October 19, 1973, in the form of a "Judgment" from the district court. Unlike the majority, however, I attach no constitutional or jurisdictional import to the fact that the district court labeled its October 19, 1973, order as a "Judgment." This judgment was a consent decree, that is, "[a] judgment entered by consent of the parties whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing." *Black's Law Dictionary* 410 (6th ed. 1990) (defining a consent decree).[6] Moreover, the

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[6]"A consent decree is, by definition, based on an agreement between the parties, not on the judgment of a court, and thus the stage of litigation at which the decree is entered makes no difference." Owen M. Fiss, *Justice Chicago Style*, 1987 U. Chi. Legal F. 1, 12-13. I hasten to add that, "[w]ith the procedural merger of law and equity in the federal and most state courts under the Rules of Civil Procedure, the term 'judgment' has generally replaced 'decree.'" *Black's Law Dictionary* 410 (6th ed.1990). The inquiry, as discussed infra, must focus on whether the October 19, 1973, judgment constituted "the last word of the judicial department with regard

judgment falls squarely within the PLRA's definition of a consent decree because it "is based in whole or in part upon the consent or acquiescence of the parties." 18 U.S.C.A. § 3626(g)(1). The judgment expressly adopted the stipulated rules and regulations of the Arizona State Prison system, ordering:

> That the Prisoner Rules, Regulations and Discipline Program of the Arizona State Prison attached to this Judgment as Exhibit No. I and incorporated by reference are approved, the procedural rules and requirements to be effective immediately, the substantive rules to be effective within a reasonable time to allow for printing in booklet form, presentation to the inmate population and sufficient opportunity for inmates to become acquainted with the violations set out.

Perhaps most importantly for purposes of this litigation, the relief embodied in the prison rules and regulations constitutes "prospective relief" under the meaning of that term as provided by the PLRA. *See* 18 U.S.C.A. § 3626(g)(7). The district court's judgment recited that the "court having heard arguments, considered pleadings and *stipulations*, does now *order* and adjudge . . . ." (emphasis added). The "judgment" dictated the prospective governance of the prison by ordering the Arizona State Prison to comply with the stipulated Prisoner Rules, Regulations and Discipline Program "effective

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to a particular case or controversy." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227, 115 S.Ct. 1447, 1457, 131 L.Ed.2d 328 (1995).

immediately" with respect to procedural rules and "within a reasonable time" with respect to substantive rules. Neither it, nor any other order of the court, vacated the previously entered orders requiring compliance with aspects of the now final rules.

The judgment summarily brought an end to months of negotiation and compromise between the parties. The district court ruled in favor of the plaintiffs and stated "[t]hat all relief sought by plaintiff members of the class heretofore designated to which they are entitled is granted by this Judgment and that the class, collectively and individually, is entitled to no other relief under this action." The judgment defined the class to include "all inmates who were and are serving sentences at the Arizona State Prison during the pendency of this action."

The parties and the district court clearly understood the prospective and mandatory nature of the relief embodied in the prison rules and regulations as adopted by the district court. In the twenty-three years between entry of the October 19, 1973, judgment and the enactment of the PLRA, the defendants availed themselves of the continuing supervisory jurisdiction[7] of the district court on several occasions. In 1979, the defendants proposed new disciplinary rules and regulations and

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[7]"A district court retains jurisdiction to enforce its judgments, including consent decrees." *Hook v. Arizona, Dep't of Corrections*, 972 F.2d 1012, 1014 (9th Cir. 1992) (citing *City of Las Vegas v. Clark County*, 755 F.2d 697, 701 (9th Cir. 1985)); *see also Stone v. City and County of San Francisco*, 968 F.2d 850, 854 (9th Cir. 1992) ("A consent decree is considered a final judgment despite the fact that the district court retains jurisdiction over the case.") (citations omitted).

moved to modify the October 19, 1973, judgment pursuant to Federal Rule of Civil Procedure 60(b). That the defendants returned to district court to seek amendments to the prison rules and regulations comes as no surprise, as they clearly understood that they were fulfilling their legal obligations pursuant to a stipulated agreement under the threat of contempt.[8]

On February 11, 1980, the defendants filed a "Reply to Response to Motion to Modify" which incorporated a number of modifications to the proposed rules and regulations "to meet objections raised by counsel for plaintiff class." On March 6, 1980, the district court approved the proposed rules as modified by the February 11, 1980, submission, writing:

> It was never intended that the 1973 rules be set in concrete. In view of changing State Prison conditions, a completely reorganized and staffed Department of Corrections, and the developing law in the area of prisoner civil rights, it is not surprising that after almost seven years changes in the rules and regulations should be proposed. The Court has reviewed the proposed rules as modified by defendants' February 11, 1980 pleadings and finds that on their face they meet

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[8]*See SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984) ("A consent decree is a judgment, has the force of res judicata, and it may be enforced by judicial sanctions, including . . . citations for contempt."); *see also* Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. Legal F. 19, 20 (noting that parties to a consent judgment can enforce the terms of their agreement without filing a new suit).

> minimal constitutional standards.[9] In view of this Court's past experience, it is clear that prison inmates will not hesitate to bring to the Court's attention any claimed unconstitutional application of the rules. It is appropriate to here express this Court's appreciation to John P. Frank and his associates of the law firm of Lewis and Roca for their energetic pro bono representation of the plaintiff class. They worked diligently and effectively with defense counsel to protect the interests of their clients. Even though they oppose approval of the new rules as modified, that opposition does not appear to be based on a constitutional question. The Court is grateful for their assistance.

In 1994, the defendants again requested modification of the prison rules due to changes in the law and unanticipated fac-

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[9]Earlier in the district court's March 6, 1980, Memorandum and Order, the court described its supervisory role as follows:

> It is recognized that it is neither the duty nor the prerogative of this court to dictate rules and regulations for the prison. The Court's responsibility is only to insure that the disciplinary rules on their face and as applied provide minimal due process as required by the Constitution and that their provisions do not violate the constitutional prohibition against cruel and unusual punishment.

tual circumstances. The district court granted the defendants' motion for modification by an order entered February 24, 1994. On January 18, 1995, two inmates--not previously named as parties--filed a motion to vacate the order, alleging that they had not received notice of the motion to modify the consent decree.

This last motion instigated a series of procedural problems that, for purposes of this appeal, lost their significance when the defendants moved pursuant to the recently-enacted PLRA "to terminate the consent decree entered in this case on December 22, 1972." The district court granted the defendants' motion to terminate but stayed that order pending a determination of whether the termination provision passed constitutional muster. In an interlocutory order issued March 21, 1997, the district court concluded that the termination provision violated the principle of separation of powers. The district court then vacated the February 24, 1994 order, but stayed the vacation order to resolve the motion to modify the December 22, 1972, consent decree.

The defendants and the United States of America, which intervened pursuant to 28 U.S.C. § 2403(a) to defend the PLRA's constitutionality, timely appealed from the interlocutory order of March 21, 1997. The three-judge panel affirmed the district court's invalidation of the PLRA. *See Taylor*, 143 F.3d at 1179. A majority of active judges voted to rehear the case *en banc* because the constitutional question presented touches upon a matter of considerable and nationwide public concern. *See Taylor v. United States*, 158 F.3d 1059 (9th Cir. 1998). This court has jurisdiction under 28 U.S.C. § 1292(a)(1), and I would reverse the district court's order.

II

I am mindful of the rudimentary principle "that constitutional issues not be needlessly confronted," *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 1397, 99 L. Ed. 2d 645 (1988), but I am aware of no authority that would compel this court to construe a record "to the point of disingenuous evasion." *United States v. Locke*, 471 U.S. 84, 96, 105 S. Ct. 1785, 1793, 85 L. Ed. 2d 64 (1985) (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379, 53 S. Ct. 620, 622, 77 L. Ed. 1265 (1933)). The majority suggests that "the motion that is before us—`to terminate the consent decree entered in this case on December 22, 1972'—is moot because the December 22, 1972 order (regardless of its label) was interlocutory and disappeared when the final judgment was entered October 19, 1973." *Ante*, at 6538. The October 19, 1973, judgment, according to the majority, "could not be more final" as "[i]t does not look, walk or quack like an injunction." *Id.* at 6539. I see the matter differently.

Here, the critical procedural question is not whether the October 19, 1973, judgment is an injunction, but whether the judgment fits within the PLRA's definition of a "civil action with respect to prison conditions in which prospective relief is ordered." 18 U.S.C.A. S 3626(b)(1). The record in this case resoundingly answers this question in the affirmative.

I begin by noting my agreement with the majority's assertion that the October 19, 1973, judgment was not an injunction. Although the majority seems to vacillate on this

issue, *see ante*, at 6548 n.9, the October 19, 1973, judgment clearly was not an injunction; it was a judgment by consent, entered by sanction and order of the district court. Although they bear some of the earmarks of injunctions,[10] consent decrees do not involve a decision on the merits.[11] As we

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[10]*See, e.g., System Fed'n No. 91 v. Wright*, 364 U.S. 642, 647, 81 S. Ct. 368, 371, 5 L. Ed. 2d 349 (1961); *see also Smith v. Sumner*, 994 F.2d 1401, 1406 (9th Cir. 1993) (noting that a consent judgment "can limit the exercise of official discretion in the same manner as a prison regulation"); William W. Schwarzer, A. Wallace Tashima, James M. Wagstaffe, *Federal Civil Procedure Before Trial* § 15:139:25, at 15-32.2 (1998) ("A consent decree is no more than a settlement that contains an injunction.").

[11]*See United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990) (explaining that a consent decree is "not a decision on the merits or the achievement of the optimal outcome for all parties, but [is] the product of negotiation and compromise") (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82, 91 S. Ct. 1752, 1757, 29 L. Ed. 2d 256 (1971)); *see also* Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. Rev. 291, 322 (1988) (explaining that a "district court, in approving a consent decree, is not remedying a wrong. Except in rare instances, neither party has admitted liability. Because there is no wrongful conduct to remedy, deciding whether the consent decree provisions are 'adequate' in serving the purposes of the law underlying the complaint is literally nonsensical."); 18 Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 4443, at 383 (1981) (noting that consent decrees

explained in *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996):

> Consent decrees differ from contested injunctions in that, instead of being won in contested litigation, they are issued by the court pursuant to an agreement of the parties. A consent decree is therefore in some respects contractual in nature, but the equitable decree based on the agreement is subject to the rules generally applicable to other judgments and decrees.

(citation and internal quotation omitted). In light of these principles, I am unable to endorse the reasoning advanced by the majority that the agreement embodied in the December 22, 1972, order was not *part* of the relief that was granted in the October 19, 1973, judgment. For purposes of the PLRA, it *was* the relief that was granted. *See Imprisoned Citizens Union*, 169 F.3d at 189 (explaining that the PLRA "broadly defines 'prospective relief' as including 'all relief other than compensatory monetary damages'") (quoting 18 U.S.C. § 3626(g)(7)); *see also Benjamin*, 1999 WL 188240, at *10 (noting that the PLRA broadly defines "[a] consent decree . . . as relief entered by the court, and it is well established that a federal court ordinarily has the power to enforce its own orders and judgment") (citations and internal quotation marks omitted). Thus, the majority's suggestion that the defendants should have moved to terminate the October 19, 1973,

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"entered upon settlement by the parties may assume forms that range from simple orders of dismissal with or without prejudice to detailed decrees.").

judgment rather than the December 22, 1972, order, is highly technical and, ultimately, immaterial because the October 19, 1973, judgment expressly adopted the stipulated prison rules and regulations as contemplated in the December 22, 1972, order.[12] Moreover, "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *United States v. M. Cutter Co.*, 130 F.3d 440, 441 (9th Cir. 1997) (quoting *Foman v. Davis*, 371 U.S. 178, 181, 83 S. Ct. 227, 228, 9 L. Ed. 2d 222 (1962)).

Consent decrees are jurisprudentially anomalous in that they reflect the attributes of a contract and a judicial act. *See Firefighters*, 478 U.S. at 519, 106 S. Ct. at 3073. "Though a consent decree has judicial features, it is 'the parties' consent [that] animates the legal force of a consent decree.' " *Sumner*, 994 F.2d at 1406 (quoting *Firefighters*, 478 U.S. at 525, 106 S. Ct. at 3077). Thus, the supervising tribunal must enforce a consent decree in accordance with the intent of the parties, see *System Fed'n No. 91*, 364 U.S. at, 647, 81 S. Ct. at 371, and, in doing so, the court maintains authority to modify or interpret

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[12]I also note that, in general, consent decrees most certainly do not "merge" into judgments or "disappear." *See, e.g., Local Number 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 523-24 n.13, 106 S. Ct. 3063, 3076 n.13, 92 L. Ed. 2d 405 (1986) (explaining that a consent decree continues jurisdiction in a single court (the issuing court), thereby facilitating enforcement through the court's contempt powers); *In re Pearson*, 990 F.2d at 657 ("The entry of a consent decree does not 'kill' a case or terminate a district court's jurisdiction.").

such decrees in light of changed circumstances. *See id.* at 646-47, 81 S. Ct. at 370-71; *see also In re Pearson*, 990 F.2d 653, 657 (1st Cir. 1993) (explaining that the authority to modify a consent judgment "is part of a court's inherent powers and exists regardless of whether a particular consent decree expressly so provides").

Here, the parties voluntarily terminated a law suit by assenting to the terms specified in the stipulated prison rules and regulations, a negotiated agreement that a federal district court judge in Phoenix, Arizona agreed to enforce as a judgment. The record in this case amply demonstrates that the parties desired and expected that the prison rules and regulations would be reflected in and enforceable as a judicial decree prospectively until such time as the rules were modified or terminated by the district court. Accordingly, I respectfully must disagree with the majority's assertion that the October 19, 1973, judgment "left nothing more for the district court to do." *Ante*, at 6549. Like the consent decrees at issue in *Benjamin, Imprisoned Citizens Union, Hadix, Dougan*, and *Inmates of Suffolk County Jail, Gavin*, and *Plyler*, the October 19, 1973, judgment entered in this case has subjected the defendants to ongoing federal court supervision and enforcement for the past twenty-five years.[13] Indeed, when the district court entered

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[13]The majority, citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381-82, 114 S. Ct. 1673, 1677, 128 L. Ed. 2d 391 (1994), opines that "the [district] court did not have continuing supervisory jurisdiction because the October 19, 1973 judgment did not state that it was retaining jurisdiction." *Ante*, at 6549-50 n.11. Contrary to its characterization by the majority, *Kokkonen* held that a district

judgment on October 19, 1973, this litigation was far from "over," and it is no answer to say that "changing the rules did not require court approval." *Ante*, at 6550 n. 11. In seeking the district court's approval, the defendants were doing quite a bit more than "ask[ing] the court's blessing." Id. Rather, as previously explained, when they moved to amend the rules, the defendants were fulfilling their legal obligations pursuant to a stipulated agreement under the threat of contempt.

Although I am uncertain how a consent decree should

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court does not have inherent power to enforce terms of a settlement agreement under the doctrine of ancillary jurisdiction where the court previously had dismissed the case pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii). *See* 511 U.S. at 381-82, 114 S. Ct. at 1677. Unlike the October 19, 1973, judgment at issue before us, the district court in *Kokkonen* did not adopt the parties' settlement as part of the judgment. See id. at 377, 114 S. Ct. at 1675. Moreover, a closer inspection of *Kokkonen* reveals that the Court explicitly set forth two exceptions where ancillary jurisdiction is always proper: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent . . . and (2) *to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees*." *Id.* at 379-80, 114 S. Ct. at 1666 (emphasis added) (citations omitted). The latter is exactly what the district court did here. The October 19, 1973, judgment expressly adopted the terms of the prison rules and regulations, and the district court has continued to vindicate its authority and effectuate that decree for the past twenty-five years.

look,[14] the October 19, 1973, judgment at issue has neither walked nor quacked like a "final" judgment for the past quarter century. This was just the sort of judgment upon which Congress set its sights when it crafted the PLRA's termination provision. The plaintiffs' challenges to the constitutionality of that provision are live and squarely before us. We should not duck the question.

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[14]The "looks" of a consent decree have befuddled federal judges for some time. *See Firefighters*, 478 U.S. at 523, 106 S. Ct. at 3075-76 (noting that although "a consent decree looks like a judgment entered after trial, . . . the mere existence of an unexercised power to modify the obligations contained in a consent decree does not alter the fact that those obligations were created by agreement of the parties rather than imposed by the court"); *McGourkey v. Toledo & O.C. Ry. Co. et al.*, 146 U.S. 536, 544-45, 13 S. Ct. 170, 172, 36 L. Ed. 1079 (1892) ("Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees."). I note that before we took this case *en banc*, two federal district judges and a unanimous panel of this court believed that the relief at issue in this case looked like the type of relief typically encompassed within a consent decree. *See Taylor v. United States*, 143 F.3d at 1179; *Taylor v. Arizona*, 972 F. Supp. 1239, 1241-42 (D. Ariz. 1997).

The divorce decree, which may be the most common type of consent decree, operates exactly like the one here: it is a final appealable judgment, provides no other relief to the parties, but often adopts rules governing the parties' future conduct, such as child or spousal support payments or custodial or visitation rights.

III

This *en banc* panel was called upon to consider one question: whether the termination provision contravenes the inviolate constitutional principle of separation of powers. Such questions of law engender *de novo* review. *See Tierney v. Kupers*, 128 F.3d 1310, 1311 (9th Cir. 1997).

In determining whether Congress has trespassed into the constitutional sphere occupied by Article III courts, our review is not free from constraint. Rather, when examining congressional enactments such as the PLRA for constitutional infirmities, we "give great weight to the decision of Congress." *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 693 (9th Cir.) (citation omitted), *cert. denied*, _____ U.S. _____, 118 S. Ct. 625, 139 L. Ed. 2d 606 (1997). We ordinarily recognize that when a federal court "is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384, 109 S. Ct. 647, 661, 102 L. Ed. 2d 714 (1989) (quoting *Bowsher v. Synar*, 478 U.S. 714, 736, 106 S. Ct. 3181, 3193, 92 L. Ed. 2d 583 (1986) (Stevens, J., concurring)). Although we may not abdicate our responsibility to strike down constitutionally unsound statutes, this court adheres to a principle of presumptive constitutionality when evaluating the validity of federal statutes. *See United States v. Henson*, 123 F.3d 1226, 1232 (9th Cir. 1997); *see also Phillips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997) ("A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis

which might support it. . . .") (quoting *Heller v. Doe*, 509 U.S. 312, 320-21, 113 S. Ct. 2637, 2643, 125 L. Ed. 2d 257 (1993) (citations and internal quotations omitted)). It is with these principles that I turn to the merits of this case.

IV

I divide the district court's conclusion that the termination provision violates the separation-of-powers doctrine into two lines of inquiry. First, I examine whether the termination provision constitutes a legislative reopening of the final judgments of Article III courts. *See Plaut*, 514 U.S. at 218, 115 S. Ct. at 1452-53. Second, I analyze whether the termination provision mandates the result in particular cases or controversies, another impermissible legislative encroachment into Article III territory. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47, 20 L. Ed. 519 (1871).[15] I address these issues in turn.

A

The constitutional analysis is circumscribed by three Supreme Court decisions spanning two centuries: *Plaut*; *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 112 S. Ct.

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[15]The district court did not address the defendants' arguments on this second question. We have discretion in deciding whether to rule on this issue, *see Singleton v. Wulff*, 428 U.S. 106, 121, 96 S. Ct. 2868, 2877-79, 49 L. Ed. 2d 826 (1976); *Nelson v. City of Irvine*, 143 F.3d at 1205-06, and I now exercise that discretion. I do so because the *Klein* doctrine is simply another aspect of the separation-of-powers principle.

748, 116 L. Ed. 2d 867 (1992); and *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 15 L. Ed. 435 (1855) (*Wheeling II*). The district court read these cases as requiring the invalidation of the PLRA's termination provision. I read them differently.

Plaut involved a Congressional attempt to reverse the effects of the Supreme Court's earlier decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991). In *Lampf*, the Court adopted a uniform national limitations period for civil actions under section 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. § 78j(b). As a result of the *Lampf* decision, litigants with pending section 10(b) cases found themselves with untimely claims that were then dismissed on the merits. Several months later, Congress enacted a statute that required courts to reinstate a dismissed section 10(b) action on the motion of a plaintiff if the action would have been considered timely before the *Lampf* decision. The *Plaut* Court concluded that this prospective restoration of the old limitations period worked an undue legislative interference with the historic independence of Article III courts "[b]y retroactively commanding the federal courts to reopen final judgments." *Plaut*, 514 U.S. at 219, 115 S. Ct. at 1453. The Court defined "final judgments" as decisions that represent "the last word of the judicial department with regard to a particular case or controversy." *Id.* at 227, 115 S. Ct. at 1457.

In *Rufo*, the Court considered the application of finality principles in the context of consent decrees. *Rufo* involved a county sheriff who sought modification of a consent decree to allow the county jail to bunk two inmates per cell. The district court denied the request, and the First Circuit affirmed,

concluding that the consent decree closed the question with finality. The Supreme Court vacated the district court's decision, holding that, "[o]nce a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the district court should determine whether the proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 391, 112 S. Ct. at 763.

Echoing a tactic frequently employed by courts and commentators, the district court in the case before us extracted from the *Rufo* decision the following quotation: "a consent decree is a final judgment that may be reopened only to the extent that equity requires." *Id.*, 112 S. Ct. at 764. From this quotation, the district court shaped the following deductive scheme: Congress, under *Plaut*, cannot mandate the reopening of final judgments without offending the principle of separation of powers; a consent decree is a final judgment under *Rufo*; therefore, Congress cannot mandate the reopening of consent decrees. The syllogism fails. Although I do not quarrel with its major premise, the minor premise cannot withstand scrutiny.

The Court in *Plaut* expressly distinguished the statute before it from "legislation . . . that altered the prospective effect of injunctions entered by Article III courts." *Plaut*, 514 U.S. at 232, 115 S. Ct. at 1459 (citing *Wheeling II*, 59 U.S. (18 How.) at 421). *Wheeling II* is the earliest and most significant of a line of cases that are excepted from the general proscription against legislative interference with the final judgments of Article III courts. *Wheeling II* was the second incarnation of an original action brought in the Supreme Court by the State of Pennsylvania. The State had sued to enjoin the defendant's bridge as an obstruction of navigation on the Ohio River. In the

first stage of the litigation, the Court issued an injunction requiring the defendant to remove or elevate the bridge. *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 626-27, 14 L. Ed. 249 (1852). After this earlier ruling, Congress passed a statute establishing the bridge as a post road and requiring vessels using the Ohio to avoid interfering with the structure. A storm then destroyed the original bridge, prompting the parties to return to the Court when the bridge company sought to rebuild. Pennsylvania attempted to interpose its original injunction, claiming that Congress lacked constitutional authority to reverse the effects of that injunction through subsequent legislation. The Court disagreed and held that Congress has the power to regulate interstate commerce, which necessarily includes "the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation." *Wheeling II*, 59 (18 How.) U.S. at 431.

The *Wheeling II* Court thus established the precept that a forward-looking judgment in equity remains subject to legislative alterations whereas a judgment at law is forever immune to subsequent changes in the law. *See Wheeling II*, 59 U.S. (18 How.) at 431; *see also Landgraf v. USI Film Prods.*, 511 U.S. at 273, 114 S. Ct. at 1501 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."); *System Fed'n No. 91*, 364 U.S. at 651-52, 81 S. Ct. at 373-74 (holding that the district court abused its discretion by failing to revise an injunction to permit labor practice that had been unlawful at the time consent decree was entered but subsequently had been legalized); *Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 818 (D.C. Cir. 1974) (holding that vulnerability to legislative alteration "would seem to depend on the character of

the compliance called for"). The *Rufo* Court itself noted the distinction between "restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative." *Rufo* , 502 U.S. at 379, 112 S. Ct. at 758 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114, 52 S. Ct. 460, 462, 76 L. Ed. 999 (1932)).

From *Wheeling II* and its progeny I distill this clear principle: although a consent decree constitutes a final judgment in the sense that it is an appealable order, it is not a final judgment for separation-of-powers analysis because it does not represent "the last word of the judicial department with regard to a particular case or controversy" as set forth in *Plaut*. 514 U.S. at 227; 115 S. Ct. at 1457. As other circuits have concluded, although a consent decree is a final judgment, it is not the last word of the judicial branch. *See, e.g., Dougan*, 129 F.3d at 1426. The courts maintain jurisdiction over these judgments, not only to ensure compliance, but also to modify them as future changes in the facts and law may require. *See Imprisoned Citizens Union*, 169 F.3d at 184, *Gavin*, 122 F.3d at 1087; *Plyler*, 100 F.3d at 371.

The principle set forth above, of course, undermines the minor premise in the district court's deductive scheme and dismantles the syllogism. It does not answer, however, the more difficult question whether Congress, rather than the judicial department, possesses the constitutional authority to reopen a consent decree "to the extent that equity requires."

I recognize that neither *Wheeling II* nor *Plaut* is completely instructive on this weighty issue. In *Wheeling II*, the

Court itself decided that it would not enforce its original injunction after the law had been changed by Congress. *See Wheeling II*, 59 U.S. (18 How.) at 431-32. Congress, however, did not mandate that decision directly. In *Plaut*, the Court distinguished between a district court's discretionary power to set aside a judgment pursuant to Federal Rule of Civil Procedure 60(b), the procedural mechanism at issue in *Rufo*, and Congress' attempt to require that a judgment be set aside. *See Plaut*, 514 U.S. at 233-34, 115 S. Ct. at 1460-61. Notwithstanding those distinctions, the termination provision survives. This is so because the relief at issue is embodied in the idiosyncratic form of a consent decree. *See Gavin*, 122 F.3d at 1088 ("Our inquiry . . . is whether the consent decree is the 'last word' of the Article III courts in the case, and the existence of Rule 60(b), as construed in *Rufo*, makes it unlikely that a court's approval of a consent decree constitutes the court's `last word' on the issue of what relief is appropriate in perpetuity."). I conclude that the termination provision removes only the court's power in the future to enforce previously-ordered equitable relief when prospective relief, as broadly defined by the PLRA, does not remain necessary to correct a current, ongoing violation of a federal right. *See Local Number 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 525, 106 S. Ct. 3063, 3077, 92 L.Ed. 2d 405 (1986); *Imprisoned Citizens Union*, 169 F.3d at 184; *see also Gavin*, 122 F.3d at 1086 ("Congress may alter the remedial powers of the federal courts so that the courts may not enforce equitable relief previously awarded in pending cases.").[16]

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[16]The plaintiffs rely on another factual distinction between *Wheeling II* and the consent decree in this case. Specifically, the plaintiffs correctly observe that the right

My reading of the intersection among *Plaut, Rufo*, and Rule 60(b) is by no means a novel one, for Congress possesses well-established authority to require a court in equity to make specific findings before issuing injunctive relief. *See Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330, 58 S. Ct. 578, 581, 82 L. Ed. 872 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.") (upholding Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1994)); 28 U.S.C. § 2283 (1994) (Anti-Injunction Act); 28 U.S.C. § 1341 (1994) (Tax Injunction Act). That the original supervising tribunal in the case at bar

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underlying the injunction in *Wheeling II* was a right "under the regulation of Congress," *see Wheeling II*, 59 U.S. (18 How.) at 431, whereas the right underlying consent decrees in prison conditions litigation is a constitutional right, namely, the Eighth Amendment. That distinction, however, cannot bear the weight the plaintiffs place upon it for two reasons. First, as noted above, Congress has not amended the constitutional law on which the plaintiffs' original cause of action was based. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 524, 117 S. Ct. 2157, 2166, 138 L. Ed. 2d 624 ("The power to interpret the Constitution in a case or controversy remains in the Judiciary."). Rather, it has limited the power of federal courts to enforce relief greater than that required by the Eighth Amendment. Second, the *Wheeling II* Court did not premise Congress' ability to alter the prospective effects of the injunction on the necessary condition that the right underlying the injunction be "under the regulation of Congress." Although I agree that *Wheeling II* may be read as positing this as a sufficient condition, nothing in the opinion suggests that Congress lacks authority to alter prospective effects when the underlying right is constitutional.

issued the injunctive relief before Congress restricted the court's authority to do so is "of [no] constitutional significance." *Gavin*, 122 F.3d at 1087; *see also Western Union Tel. Co. v. International Bhd. of Elec. Workers*, 133 F.2d 955, 958-59 (7th Cir. 1943) (requiring district court to apply Norris-LaGuardia Act to injunction entered eight years before the Act was enacted).

As a final matter, I observe that the district court found the *Wheeling II* line of cases inapposite, narrowly interpreting *Wheeling II* to stand for the proposition that Congress may interfere with consent decrees only to the extent that the relevant legislation is based on "public rights common to all." *Taylor v. Arizona*, 972 F. Supp. at 1246 (citing *Wheeling II*, 59 U.S. (18 How.) at 432-32). I would reject the so-called public rights/private rights distinction in this context. The authority to do so rests in *Plaut* where the Supreme Court stated that "the doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Plaut*, 514 U.S. at 239, 115 S. Ct. at 1463. In other words, the source of the underlying right is irrelevant to the separation-of-powers inquiry. *See Gavin*, 122 F.3d at 1088 ("The character of the right involved has nothing to do with the separation-of-powers issue.") (citing *Plaut*, 514 U.S. at 230, 115 S. Ct. at 1458); *see also Imprisoned Citizens Union*, 169 F.3d at 186 ("[T]he *Wheeling Bridge* Court's decision ultimately turned on the nature of the relief, not the source of the right."); *cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853-54, 106 S. Ct. 3245, 3258-59, 92 L. Ed. 2d 675 (1986) (analyzing the public/private rights distinction in the context of Congress' power to assign certain controversies to non-Article III tribunals); *Hodges v. Snyder*, 261 U.S. 600, 603-04, 43 S. Ct. 435, 436-37, 67 L. Ed.

819 (1923) (analyzing the distinction in the context of due process and vested rights).

Moreover, even were I to accept the district court's "public rights" requirement as narrowing the circumstances under which Congress may alter prospective judgments, I still would uphold the termination provision. Recognizing that we must, whenever possible, interpret a statute in a fashion that renders it constitutionally valid, *see Communications Workers of Am. v. Beck*, 487 U.S. 735, 762, 108 S. Ct. 2641, 2657, 101 L. Ed. 2d 634 (1988), I read the provision as nothing more than a generally applicable change in substantive statutory law. *See Imprisoned Citizens Union*, 169 F.3d at 186-87 ("Our holding today would be no different if we were to decide that the *Wheeling Bridge* exception only applies where public rights are at stake. To whatever extent the consent decree embodies private rights, those rights are unaffected by the PLRA."); see generally Guido Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 Yale L.J. 1191, 1198-99 (1962) (evaluating Congressional enactments that alter the effect of existing contractual obligations of the federal government). Because nothing in the case law convinces me that the source of the legal rule is dispositive, I cannot say that the termination provision amounts to a legislative reopening of a final judgment.

B

I next turn to the question whether the termination provision prescribes a rule of decision in violation of a different aspect of the separation-of-powers principle, first articulated by the Supreme Court in the years following the Civil War. *See Klein*, 80 U.S. (13 Wall.) at 146-47. The plaintiff in *Klein* was

the administrator of the estate of V.F. Wilson, a Confederate sympathizer. Congress had passed a statute that permitted noncombatant Confederate landowners to recover confiscated goods upon proof of their loyalty to the Union. The administrator brought suit in the Court of Claims pursuant to this statute, attempting to recover proceeds from the sale of Wilson's previously confiscated cotton. To that end, the administrator tendered evidence that Wilson had received a presidential pardon, mindful that the Supreme Court earlier had held that such a pardon was conclusive proof of loyalty. *See United States v. Padelford*, 76 U.S. (9 Wall.) 531, 19 L.Ed. 788 (1869). The Court of Claims ruled in favor of the administrator, but as his claim was on appeal to the Supreme Court, Congress passed a statute which declared that a presidential pardon actually proved disloyalty. Accordingly, the new statute directed the judiciary to dismiss any pending recovery actions brought on behalf of a pardon recipient. *See Klein*, 80 U.S. (13 Wall.) at 131-34.

When the government moved the Supreme Court to dismiss the administrator's case, the Court struck down the statute. *See id.* at 148. It held that the new statute "passe[d] the limit which separates the legislative from the judicial power" by requiring the trial court "to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill." *Id.* at 146. By forcing courts to discount the legal or evidentiary effect of a presidential pardon, Congress had "prescribe[d] a rule for the decision for a cause in a particular way." *Id.* In reaching its holding, the *Klein* Court distinguished *Wheeling II* as an instance in which "the court was left to apply its ordinary rules to the new circumstances created by the act [whereas in *Klein*] no new circumstances have been created by the act." Id. at 147.

Although the Supreme Court has not delineated "the precise scope of *Klein* . . ., later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 514 U.S. at 218, 115 S. Ct. at 1452 (quoting *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 441, 112 S. Ct. 1407, 1414, 118 L. Ed. 2d 73 (1992)); *see also Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993) ("*Klein* does not preclude Congress from changing the law applicable to pending cases.") (citations omitted). "Thus, if a statute 'compel[s] changes in the law, not findings or results under old law,' it merely amends the underlying law, and is therefore not subject to a *Klein* challenge." *Imprisoned Citizens Union*, 169 F.3d at 187 (quoting *Robertson*, 503 U.S. at 438, 112 S. Ct. at 1413).

In resolving whether the termination provision impermissibly prescribes a rule of decision, I conclude that the termination provision falls more neatly under the Wheeling II paradigm. When the termination provision is read conjunctively with the prospective relief provision, the result is a rather narrow limitation that preserves the need for judicial decision-making. Under the PLRA, a district court now must determine (i) whether there is a current and ongoing violation of a federal right and (ii) whether prospective relief remains necessary to correct such a violation. *See* 18 U.S.C.A. §§ 3626(b)(3). If the court answers both questions in the affirmative, it must then determine what type of prospective relief furnishes the least intrusive means to correct the violation. *See id.* §§ 3626(a)(1)(A),(b)(2),(b)(3). Only after resolving the first two questions may the court determine whether prospective relief terminates, or, instead, if prospective relief still must be fashioned to fit the failing found. In view of this scheme, it cannot be said that the termination provision leaves a district

court with "no adjudicatory function to perform." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 392, 100 S. Ct. 2716, 2729, 65 L. Ed. 2d 844 (1980). Rather, the PLRA "has left the judicial functions of interpreting the law and applying the law to the facts entirely in the hands of the courts." *Gavin*, 122 F.3d at 1089; *accord Hadix*, 133 F.3d at 943 ("The interpretation and application of law to fact and the ultimate resolution of prison condition cases remain at all times with the judiciary.").

Under the PLRA, courts remain free to interpret the law in prison conditions litigation and to apply the law to the facts as the court discerns them. Stated more simply, the termination provision lets judges be judges. For this reason, the PLRA does not run afoul of the *Klein* doctrine.

V

The simple labeling of the consent decree at issue as a "judgment" did not eradicate the district court's continuing supervisory power over the management of the Arizona State Prison System. That decree was hardly the "last word of the judicial branch" as to the rules the prison officials abided by, subject to contempt of court. Therefore, we were required in this case to determine whether through the PLRA, Congress is empowered to require the district court to cease his management of the prison system, unless he makes the findings required by the PLRA. Supreme Court precedent, the inherently impermanent nature of relief obtained through consent decrees, and the presumptive cloak of constitutionality adorning federal statutes convince me that the enactment of the termination provision was well-within Congressional power and did not encroach into the powers traditionally reserved for Article III tribunals.

GRABER, Circuit Judge, with whom KLEINFELD and WARDLAW, Circuit Judges, join, dissenting:

I dissent. I join the dissenting opinion of Judge Wardlaw, because (1) the "judgment" in this case embodies prospective relief—as the district court and the parties well understood over the years—making the constitutional question ripe for decision, and (2) the termination provision of the Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626(b)(2), is constitutional in limiting prospective relief. I write separately to address an additional flaw in Judge Rymer's analysis: her inclusion of Part II(B).

When a majority opinion holds, as this one does, that our court lacks a proper opportunity to decide a legal issue that the parties attempt to present, a dissenter has two choices. She can limit her disagreement to the question of our court's authority, or she can go on to describe how she would resolve the substantive issue that, in her view, the court has authority to decide. The dissenter's choice of the latter style grants no license to the author of the majority opinion to include dictum on the substantive issue. Such dictum dilutes the message that the bench and bar should be receiving: that the substantive issue remains unresolved as a matter of law.

(4)

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IN THE
Supreme Court of the United States

JAMES BENJAMIN ET AL,
Petitioners,

v.

BERNARD KERIK, ET AL,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court for Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Are the constitutional restrictions on Congress' power to enact retroactive legislation inapplicable in this case solely because the legislation terminates consent decrees that include ongoing injunctive relief?

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BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF CERTIORARI -

INTEREST OF THE AMICUS[1]

Public Citizen is a non-profit organization with approximately 150,000 members. This petition raises important constitutional issues whose potential impact extends far beyond the prison litigation context that is directly at issue here. Public Citizen agrees with petitioners that Congress' attempt in section 802(b) of the Prison Reform Litigation Act, 18 U.S.C. § 3626 (the "PLRA"), to change the conditions of existing injunctive orders and consent decrees violates principles of separation of powers, due process, and equal protection. It further agrees that the recent decision of the en banc Ninth Circuit in *Taylor v. United States*, Nos. 97-16069 and 97-16071, 1999 WL 402748 (June 21, 1999), further heightens the need for review. Public Citizen submits this brief, with the parties' consent, to explain why the PLRA also violates this Court's long-standing rule that retroactive legislation is highly disfavored and why the rationales behind that rule are also closely related to petitioners' arguments.

Through its Litigation Group, Public Citizen has been counsel in many of this Court's most important separation of powers cases, including *INS v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Mistretta v. United States*, 488 U.S. 361 (1989). Its attorneys were also co-counsel in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1991), which prompted Congress to pass the PLRA, and in the unsuccessful effort by the plaintiffs in *Rufo* to overturn the

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[1] No person other than the *amicus curiae* and its counsel authored or made a monetary contribution toward the preparation or submission of this brief.

PLRA, *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 2366 (1998). Its lawyers have in the past, and expect in the future, to represent plaintiffs (including prisoners) in lawsuits against agencies of the state and federal governments that may result in injunctive relief and/or consent decrees. If the PLRA is upheld, Congress may well extend its retroactive approach to other areas where governments find it inconvenient to abide by promises made to settle litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The PLRA changes the rules under which judgments -- whether based on a consent decree or a court ruling -- may be altered to relieve state and federal prison officials from their existing obligations. There is no disagreement that Congress made it much easier for those officials to terminate existing court orders, nor that Congress did not attempt to change (not could it have changed) the substantive law under which those orders were entered -- the Eighth and Fourteenth Amendments to the Constitution. It is clear that Congress may apply the PLRA to decrees entered after its effective date; the question is, may it constitutionally impose the PLRA retroactively?

The effect of the PLRA is the same as if respondents unilaterally added an automatic termination date to existing decrees that contained no such provision. Although the PLRA theoretically allows petitioners to maintain their decrees, that can occur only if they can prove a current violation of federal law. But that possibility cannot save the statute because requiring petitioners to start over again deprives them of the benefit of the long-term bargains they struck when the decree was entered. Therefore, if the PLRA is upheld, petitioners will have sacrificed their existing rights and obtained no more than

the opportunity to bring another lawsuit.

The issue presented here is analytically identical to that in cases where this Court has carefully scrutinized attempts by Congress to alter existing rights by retroactive legislation. Although resolved on statutory grounds, *Landgraf v. USI Films Products*, 511 U.S. 244 (1994), spells out the constitutional considerations that determine whether the retroactive aspects of a law, such as the PLRA, will be upheld, including the breadth of the change in the law and the extent to which that change was foreseeable. In some cases, such as *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995), the rights of those affected by a retroactive change in the law were embodied in a litigated judgment, while in others, such as *United States v. Winstar*, 518 U.S. 839 (1996), and *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (1998), they were based on contractual arrangements like the consent decree at issue in this case. And in others, such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the rights were not embodied in any written agreement, but were part of a general understanding of the kinds of protections private parties have from governmental interference with their property. Although this Court has been willing to allow certain kinds of changes in existing expectations, it has done so only after carefully weighing the legitimate expectations of the private party and the governmental interests at stake.

The PLRA was intended to eradicate rights to continuing relief granted prisoners in existing consent decrees, regardless of what they gave up in exchange for those rights, and with no showing of the kind of strong governmental interest that might justify such an invasion of petitioners' legitimate decree-based expectations. Yet here the Second Circuit in this case, like other courts that have considered the constitutionality of the PLRA, failed to consider how the PLRA fits into this

Court's rulings involving retroactive legislation.

Because those rights are contained in a decree that has been approved by a federal judge does not, as the courts that have upheld the PLRA seem to believe, make it *easier* for Congress to alter petitioners' rights; if anything, that fact should give those rights a firmer foundation and make altering them even more difficult. Those courts have mistakenly relied on *Pennsylvania v. Wheeling & Belmont Bridge*, 59 U.S. (18 How.) 421 (1856), but that case merely recognizes that a change in the substantive law on which an injunction is based (which respondents admit did not occur here) is a valid reason for modifying the injunction prospectively. Surely, if an industry had obtained a decree against a federal agency that established a mutual set of rights and obligations like those in this decree, and if Congress passed a law allowing that agency to walk away from its duties as respondents will be able to do here, this Court would scrutinize such a law with great care and not permit Congress to legislate retroactively in the absence of a substantial justification. The fact that petitioners are prisoners, rather than businesses, should only heighten the need for scrutiny, given their lack of power and their inability to defend themselves in the legislative arena.

When properly examined as retroactive legislation, the PLRA must fall. The existing rights of prison officials to modify consent decrees, as set forth in *Rufo* and Rule 60(b) of the Federal Rules of Civil Procedure, provide them ample protection against changed circumstances, while assuring that both sides will retain their bargained-for benefits. Moreover, this case presents an excellent opportunity for the Court to consider its various rights-based decisions concerning retroactive legislation in a different context, and to produce a unified theory that brings together seemingly disparate authorities.

REASONS FOR GRANTING THE WRIT

I. The Lower Courts in PLRA Cases Have Failed to Follow This Court's Teachings Regarding Retroactive Legislation.

The fundamental error made by the Second Circuit in applying the PLRA to existing consent decrees is in failing to recognize that the PLRA is retroactive legislation. *See generally*, Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv L. Rev. 1056 (1997) To be sure, this petition arises out of a motion to terminate a consent decree, but the basis for the motion is a law that purports to change the terms of all existing consent decrees in prison cases, making it much easier for prison officials to terminate the obligations to which they have previously agreed. Thus, the PLRA is "retroactive legislation" as this Court has used that term since it seeks to apply new rules to rights created in the past, in a manner that seriously disadvantages petitioners.

This Court's most recent and complete discussion of the objections to retroactive legislation is in *Landgraf v. USI Films Products*, 511 U.S. 244 (1994), where the Court construed the statute not to apply retroactively. The opinion of Justice Stevens for the Court is relevant to this petition in a number of respects. First, it defines retroactive legislation as that which "attaches new legal consequences to events completed before its enactment." *Id.* at 270. That description fits this situation like a glove, since the PLRA's new right for defendants to terminate has been added to a consent decree entered more than 20 years ago.

Second, the Court recognizes that there are constitutional objections to retroactive civil legislation, although

it describes the requirements of meeting them as "modest." *Id.* at 272. Third, it recognizes that the concerns about retroactive legislation are reflected in a number of specific constitutional provisions, such as the Ex Post Facto Clause, the Takings Clause, the Due Process Clauses, the Contract Clause, and the prohibition against Bills of Attainder. *Id.* at 266. Whether or not any of those prohibitions applies to this case -- and we believe that the petition correctly argues that at least the Due Process Clause does -- the policies behind them all support the Court's deep concerns over retroactive laws like the PLRA.

Fourth, a number of the specific objections voiced in *Landgraf* mirror this situation. Thus, the same "elementary considerations of fairness [that] dictate that individuals should have the opportunity to know what the law is and conform their conduct accordingly," that were found wanting in *Landgraf* because "settled expectations [were being] disrupted" (*id.* at 265), are being trampled on here. The PLRA has disrupted existing consent decrees and destroyed petitioners' reasonable reliance on the inability of respondents to walk away from their obligations, causing petitioners to lose "confidence about the legal consequences of their actions." *Id.* at 266. Similarly, the PLRA affects "contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 271. At bottom, concerns about retroactive laws are about "fair notice, reasonable reliance, and settled expectations," *id.* at 270, each of which is at issue here.

Fifth, even if the PLRA could be viewed as a change in procedural rules, *Landgraf* eliminates any notion that such a label ends the inquiry: "Nor do we suggest that concerns about retroactivity have no application to procedural rules." *Id.* at 275, n 29. Justice Scalia's concurring opinion underscores that point by his example that a change in a rule of evidence, which

would be procedural, would not be applied to testimony already given. *Id.* at 291-92.

Finally, Justice Stevens points to a particular vice of retroactive legislation that reinforces petitioners' equal protection argument: "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individual consideration. Its responsivity to political pressures pose a risk that it may be tempted to use retroactive legislation as a means of retaliation against unpopular groups or individuals." *Id.* at 266.

At the end of last Term, this Court dealt with another case involving the presumption against retroactive legislation. *Martin v. Hadix*, 119 S.Ct. 1998 (1999), construed section 803(d)(3) of the PLRA, that limits the hourly rate for attorneys in prison litigation, not to apply to work performed before the effective date of the Act. Although the case presented only statutory issues, the opinions of Justice O'Connor for the majority, and Justice Ginsberg for the partial dissent, employ terminology that implicitly confirms the constitutional basis for the presumption. Thus, the majority spoke of "an impermissible retroactive effect" (*id.* at 2003), "retroactivity concerns" (*id.* at 2007), and "retroactivity problems" (*id.*), while the dissent twice described the effects of applying the law to litigation begun before the effective date as "impermissibly retroactive." *Id.* at 2011.

Most of this Court's decisions dealing with due process challenges to retroactive legislation have involved businesses that claimed that Congress added burdens to transactions that were already completed. For example, in *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984), Congress increased the withdrawal liability obligations of

companies that participated in common pension funds, with an effective date five months prior to enactment. In sustaining the law, this Court noted that the retroactive element must be justified by a legislative purpose beyond that needed to sustain its prospective application. *Id.* at 730. Yet respondents have attempted to meet that requirement only by claiming that existing decrees create obligations that they would prefer to eliminate. Obviously, if that rationale suffices, no retroactive law would be invalid.

The burden was satisfied in *Gray* because retroactivity was needed to remove incentives to avoid the new rules, and the period of time was limited and narrowly tailored to achieve that end. *Id.* at 731. While the Court doubted that any notice was required to satisfy due process, it found that employers such as Gray had it. *Id.* at 732. Moreover, the increased liability covered only those employees who already had vested pension rights. *Id.* at 734. By contrast, each of those factors cuts in the opposite direction in this case.

In *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (1998), this Court found that Congress had violated the Constitution by requiring companies, which were no longer in the coal business, to pay for health benefits for families of miners who once worked for them. Justice O'Connor, speaking for a plurality of four, found that the law was an unconstitutional taking, whereas Justice Kennedy found the Takings Clause inapplicable, but he concluded that the retroactive application of the law bore "no legitimate relation to the interest which the Government asserts in support of the statute" and hence violated due process. *Id.* at 2159.

However, the differences between those opinions are less significant than their common themes. Both recognized the

law's deep concern over retroactive statutes: Justice O'Connor described them as "generally disfavored," and Justice Kennedy noted "a singular distrust" of retroactive laws. *Id.* at 2151, 2158. Their descriptions of what makes a retroactive law an unconstitutional taking or a violation of due process are also similar. As Justice O'Connor described the test, a retroactive law "might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 2149; *see also id.* at 2152-53 (focussing on the "distance into the past that the Act reaches back," the "unusual" nature of the act that "singles out certain employers to bear a burden that is substantial in amount"). Justice Kennedy's concern was with "severe retroactive legislation" that "destroys the reasonable certainty and security which are the very objects of property ownership." *Id.* at 2159. While the words are different, the approaches are quite similar.

Finally, both opinions cite cases relied on by the other and recognize that the Takings and Due Process Clauses are interrelated and tie in with other, similar constitutional limits on governmental power. *Id.* at 2149, 2151, 2153 (plurality) and 2157-58 (Kennedy, J.). Even the dissent of Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, noted both the "potential unfairness of retroactive legislation" and agreed that a due process inquiry was appropriate to determine whether the law "is fundamentally unfair or unjust." *Id.* at 2163, 2164. In sum, there is "a bedrock principle with which all nine Justices seemingly concurred: the Constitution will not tolerate legislation that retroactively imposes unexpected liability on a party for a problem not of its own creation." *The Supreme Court -- Leading Cases, Eastern Enterprises v. Apfel*, 112 Harv. L. Rev. 212, 213 (1998); *id* at 218-22. Nonetheless,

neither the Second Circuit, nor any of the other courts of appeals that have reviewed the PLRA, have considered the PLRA from this perspective.[2]

Another recent decision involving contract rights, *United States v. Winstar*, 518 U.S. 839 (1996), also directly supports the position of *amicus*. None of the *Winstar* opinions spoke in terms of retroactive legislation, but that is what was at issue. Thus, Government agencies had entered into contracts to bail out insolvent thrift institutions; in turn, the companies that acquired the thrifts were allowed to use certain favorable accounting devices to satisfy the capitalization requirements under the law. After the transactions were completed, Congress amended the law to forbid those accounting devices, thereby placing the acquiring companies in immediate violation of the law's capital requirements. The Court held that the Government could not avoid the obligations to which it had agreed and on

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[2] Both the majority and the dissent in *Martin*, *supra*, described the relevant factors in assessing retroactivity in terms that closely resemble this due process analysis, although the two opinions disagreed about how those factors applied. Thus, Justice O'Connor spoke of "reasonable reliance" (*id.* at 2006), "reasonable expectations of the parties" (*id.* at 2007), and "no manifest injustice" (*id.*), and Justice Ginsburg described the law as one that "significantly alters the consequences of [prior conduct]" (*id.* at 2011) and "frustrates reasonable reliance on prior law" (*id.* at 2012). Justice Scalia's concurrence would make retroactivity turn on whether the law affected "primary conduct" (*id.* at 2008). Since petitioners' primary conduct was the decision to enter what they believed was a mutually-binding consent decree, the law would have an impermissible retroactive effect on them.

which the companies had relied in contracting with the Government.

In one sense the law at issue in *Winstar* was not retroactive since it operated only prospectively and did not cause a default for events that occurred prior to its effective date. But it was surely retroactive as the Court defined that term in *Landgraf* since it clearly "attaches new legal consequences to events completed before its enactment." 511 U.S. at 270. Thus, the accounting practices that were permitted beforehand were outlawed, and the transactions on which they were based directly undermined, just as if Congress had passed a law terminating the prior agreements with the Government, as Justice Souter recognized. 511 U.S. at 878 n.22.

Moreover, many of the policy concerns underlying the majority and concurring opinions in *Winstar* support a holding that the PLRA is unconstitutional because of its severe retroactive impact. In particular, the *Winstar* Court was deeply troubled by the Government's claim that it could upset the entirely reasonable reliance interests of those with whom it had contracted and shift the costs occasioned by the change in law to them, just as was attempted in the other retroactivity cases. As Justice Scalia put it, if the Government can change its obligations by enacting a new law, then this is "an absolutely classic description of an illusory promise" (*id.* at 921), which is what the consent decree here will become if the PLRA is upheld.

Another case in which this Court declined to apply a law having retroactive application is *United States v. Klein*, 80 U.S. (13 Wall) 128 (1872). Again, like *Winstar*, the Court did not describe the law as retroactive, but there is no doubt that it was. Congress had authorized the confiscation of property of those who aided the Confederacy in the Civil War, but a prior statute

had allowed the President to pardon those who had fought on the other side. This Court then ruled that a person who was pardoned was entitled to avoid confiscation, to which Congress responded by passing a law saying that a pardon could not be offered in evidence to defeat confiscation. Mr. Klein argued that Congress did not have the authority to alter the outcome of his case, and this Court agreed. Again, while the language of the decision is not that of a challenge to a retroactive law, that is surely what was at stake, at least for those like Mr. Klein who had applied for a pardon and taken an oath to support the United States before Congress acted.[3]

Similar concerns animate this Court's regulatory takings decisions, such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, new zoning rules effectively eliminated all significant uses for the property owner's beachfront land, thereby rendering his investment almost worthless. In balancing the state's interest in land use regulation against the property owner's reasonable investment-backed expectations, the Court held that major changes in the lawful uses of property would require compensation by the state, except when "background principles of nuisance and property law" made such changes reasonably foreseeable. *Id.* at 1030. Seen from this perspective, the zoning change in *Lucas* was like

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[3] In an apparent effort to camouflage the retroactive and substantive nature of the change in the law, Congress put the prohibition in terms of evidence that could be heard and also sought to bar this Court from taking jurisdiction in cases in which a pardon had been set up as a defense to confiscation. 80 U.S. at 143. Neither device fooled the Court or prevented it from striking down the law as applied to Mr. Klein (and presumably others similarly situated).

the imposition of major new financial obligations in *Eastern Enterprise* or *Winstar*, in contrast to the modest and foreseeable change in *PBGC v. Gray*. As applied to this case, the "background principles" of law are Rule 60(b) and cases like *Rufo* interpreting it, which contain express, but limited, exceptions to the rule that consent decrees can be altered only if all parties agree.

Two cases from the 1930s confirm that the Takings Clause also reaches retroactive laws when they affect private property. Thus, in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 578 (1935), the Court struck down a federal statute that significantly altered the rights of holders of "pre-existing mortgages." As the Court explained, "the Act is retroactive in terms and as applied purports to take away rights of the mortgagee in specific property" that had been acquired by the bank prior to passage of the Act. *Id.* at 589, 590. The statute was not infirm because it compromised the debt of the farmer who owned the property, but because it produced "a substantial impairment of the security" given to protect the lender. *Id.* at 595. While Justice Brandeis recognized that a different mortgage contract might have afforded the farmer the protections that Congress granted him, that did not permit Congress to alter rights under contracts already executed -- in that case more than ten years before Congress acted. *Id.* at 596. Similarly, in *Lynch v. United States*, 292 U.S. 571, 579 (1934), an attempt to invalidate the Government's contractual obligations to pay on War Risk Insurance policies was rebuffed under the Fifth Amendment's Taking Clause: "Valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States." In this case the Court need not decide whether these consent decrees are "private property" within the meaning of the Takings Clause, because there can be no doubt that the rights created under them

are either "property" or "liberty" within the broader protections accorded by the Due Process Clause.

Finally, the relation between retroactive legislation and the concepts of settled expectations and reasonable reliance is illustrated by *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). At issue there was the right of the Government to insist that companies wishing to sell certain pesticides disclose trade secret information. In striking the balance between the competing interests, the Court drew the line based on whether the disclosure requirement was in place when the pesticide application was submitted. *Id.* at 1007. Where it was, disclosure could be required because, as the *Lucas* court might put it, "background principles" of law would no longer protect the pesticide maker's claimed right.

Applying these principles to the PLRA would surely require its invalidation. The decree in this case was entered more than 20 years ago when petitioners had no notice of any possibility that the decree could be terminated, except for reasons provided in the decree or in the law of equity. Petitioners gave up short-term benefits for long-term security, but if the PLRA is upheld, they will be deprived of a substantial benefit of their bargain. Respondents have offered no justification for the PLRA other than the fact they would prefer to be relieved of obligations that they undertook in exchange for petitioners' agreement not to continue with their lawsuits. Balancing petitioners' reasonable reliance on the expectations arising from the consent decree, against the lack of any basis for retroactivity other than a desire by respondents not to be subject to court orders in running their prisons, the PLRA plainly constitutes "impermissible retroactive" legislation.

Despite this long line of relevant authority, none of the

lower courts have made the connection between the doctrine of impermissible retroactivity and the PLRA, let alone undertaken the kind of analysis need to sustain the PLRA's retroactive application. Because of that fundamental misunderstanding, and because this case affords the Court an excellent opportunity to bring together seemingly disparate areas of the law that deal with retroactivity, the petition should be granted.[4]

II. Of the Two Principal Cases Discussed by the Court Below, One (*Plaut*) Supports the Foregoing Retroactivity Analysis, and Nothing in the Other (*Wheeling Bridge*) Undermines It.

In *Plaut v. Spendthrift Farms*, 514 U.S. 211, 219 (1995), this Court sustained a challenge to an act of Congress that "retroactively commands the federal courts to reopen final judgments" by extending the statute of limitations after the time for appeals from those judgments had expired. The defendants had argued against retroactivity on both due process and separation of powers grounds, but the Court ruled on what it called the narrower separation of powers basis since the

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[4] All of the cases cited above involved retroactive economic legislation, and some of the Court's statements are expressly qualified by the term "economic." *Amicus* is not aware of any cases in which non-economic retroactive legislation has been challenged in court. But given this Court's general practice of providing very limited review of economic legislation, and since the PLRA infringes on petitioners' ability to obtain vindication of their constitutional right to humane treatment, the standard of review should be no less rigorous than in economic rights cases.

alternative ground would have implicated state as well as federal statutes. *Id.* at 217.

Justice Scalia's opinion focuses on the special dangers of legislative overruling of judicial decisions, including the historical basis in separation of powers for such concerns. And his conclusion that there must be a "categorical" invalidation of legislative attempts to alter judicial judgments *id.* at 240 can only be sustained under a separation of powers analysis since, under a due process/retroactivity analysis, a balancing of the interests is required. But his concerns about overturning settled (finalized) expectations extend to all retroactive legislation, not just that affecting court judgments (*id.* at 219, 227), as illustrated by the portions of his opinion that mentions other parts of the Constitution that guard against retroactive laws. *Id.* at 237-38.

The opinion is most relevant for the PLRA when it rebuts the claim that the change in the statute of limitations can be saved by analogy to Rule 60(b). *Id.* at 233-34. The opinion acknowledges that Rule 60(b) refutes the notion that final judgments can never be reopened, but the standards contained in that Rule may not be expanded by Congress imposing "a reopening requirement which did not exist when the judgment was entered" (*id.* at 234) -- once again an exact description of the impact of the PLRA in this case.[5]

One of the major flaws in the decision below is its failure

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[5] Much of the Brief in Opposition filed by the City of New York argues that the decree is unlawful or that it is no longer needed. If such claims were correct, the City would not need the PLRA to eliminate the offending provisions.

to recognize that the principles in *Plaut* extend beyond the stated Article III basis of the decision. Suppose that the case in which the statute of limitation was extended had been litigated to final judgment in a state court. *Plaut* would not literally apply, and a decision in that case would probably not produce the kind of categorical outcome mandated in *Plaut*. But surely this Court would have to examine the impact of the law under the principles of retroactivity described above and confirmed by *Plaut*.

Or suppose that the NLRB had awarded back pay to workers in a dispute with their employer, or the FCC had resolved a contest between two broadcasters over the right to a radio license, or two businesses concluded a private arbitration under the Federal Arbitration Act. Suppose further that, after each of those determinations became final, Congress passed a law that altered the outcome of those cases. The fact that none of those cases reached a court of any kind would not make the concerns underlying *Plaut* irrelevant. Rather, the victor in those three proceedings would have the same type of grievance that the defendant had in *Plaut*: a decision that each had every reason to believe was final was no longer valid because of a retroactive statute.

There is also no rationale for limiting the trigger event to Congress passing a law, even though that was the focus on this Court's separation of powers discussion. For example, suppose that the times for petitioning for rehearing in the court of appeals, or for seeking a new trial in the district court -- both of which are set by the judicial branch -- were extended after the existing times had expired. In that situation, as applied to a case in which those deadlines had passed, the retroactive effect would be the same as in *Plaut*: a final judgment would be reopened. If the determinative fact in *Plaut* were that Congress

had stepped in, then the parties in these cases, who had their victories up-ended, would lose their challenges to the retroactive application of the new timing rules. But surely the basic policy reasons behind *Plaut* would apply in the case of judicial interference as well, and the impact on the parties in both situations is identical.[6]

In our view, *Plaut* is an extreme example of the reasons why this Court has long expressed very serious concerns about retroactive legislation. There, the legislative branch not only unsettled settled expectations, but also directly overruled a determination by a coordinate branch of government whose constitutional function is to decide the legal effects of completed transactions. Thus, the statute in *Plaut* directly infringed the constitutionally-mandated independence of another branch of government, as well as injuring the parties for whom the rule of law was retroactively changed. But as the cases cited in Point I made clear, there are broader principles underlying *Plaut*, and those principles apply to invalidate the PLRA as well.

The lower courts that have upheld the PLRA have done so primarily because of their reading of *Pennsylvania v. Wheeling & Belmont Bridge*, 59 U.S. (18 How.) 421 (1856). In our view, *Wheeling Bridge* does not bear anywhere near the weight that those courts and respondents place upon it. Indeed, even the dissent in *Taylor v. United States, supra*, while voting to uphold the PLRA, recognizes that the impact of *Wheeling*

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[6] The fact that these changes did not necessarily mean that the original losing party would actually win the case, rather than simply get another try, is irrelevant since in *Plaut* itself the new law only removed the bar of the statute of limitations, but did not assist the plaintiffs in establishing their claims on the merits.

Bridge is less clear and not nearly so important as other courts have believed. Pet. Supp. Br. at 50a.

Wheeling Bridge began with a suit by Pennsylvania to have the bridge declared an obstruction to the river which was used to transport goods from Pennsylvania. The problem was that the height of the bridge required vessels to lower their pipes to get under it, which was very expensive and time-consuming. Pennsylvania's claim was that the bridge was contrary to congressional enactment and an obstruction to navigation, and this Court agreed. *Wheeling & Belmont Bridge v. Pennsylvania*, 54 U.S. (13 How.) 518, 565-66 (1851). Congress then passed a law permitting the bridge to remain in place, and Pennsylvania challenged that law.

This Court held that the injunction against the bridge must be lifted because "there is no longer any interference with the enjoyment of the public right [of passage] inconsistent with the law." *Id.* at 432. In other words, the law on which Pennsylvania relied to obtain its injunction was no longer in effect, and hence the State no longer had any right to prevent the use of the bridge. Surely, if the owner had complied with the injunction, torn down the bridge, and built a new one after the law was changed, no one would contend that the prior injunction still applied, or a new one could be obtained, since the underlying substantive law had been amended.

Wheeling Bridge was cited below and in other defenses of the PLRA for the proposition that an injunction is never final and can always be modified by the legislature. But that view is overly expansive. The principal import of *Wheeling Bridge*, on which there is no disagreement, is that, when the substantive law that formed the basis of an injunction is changed, the injunction should be modified. Indeed, that appears to be the limited

proposition for which Justice Scalia cited *Wheeling Bridge* in his concurring opinion in *Martin*, *supra*, 119 S.Ct. at 2009.

That proposition, however, simply mirrors existing law in Rule 60(b)(5) that allows modification when it is "no longer equitable that the judgment should have prospective application." That rule does not apply here because the substantive law of the Eighth and Fourteenth Amendments on which these consent decrees were based has not been changed, and Congress lacks the power to do so. Nor, as *Plaut* establishes, can Congress bootstrap its way out of that limitation by adding a new grounds for termination of existing consent decrees to Rule 60(b), which is the effect of the retroactive aspects of the PLRA. Instead, the Court must examine the retroactive aspects of the PLRA, including its impact on existing injunctions, under the standards set forth above and in light of the existing provisions of Rule 60(b). *Wheeling Bridge* may have some bearing on that analysis, but it is not the "get out of jail free card" (or, more accurately, the "get out of consent decree free card") that respondents and the lower courts contend that it is. The need to correct these overly broad readings of *Wheeling Bridge*, and the failure to appreciate the broader principles that underline *Plaut*, provide further reasons for granting review.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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No. 98-2042

In the Supreme Court of the United States

JAMES BENJAMIN, ET AL., PETITIONERS

v.

BERNARD KERIK, COMMISSIONER, NEW YORK CITY DEPARTMENT OF CORRECTION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the immediate termination provision of the Prison Litigation Reform Act of 1995, 18 U.S.C. 3626(b) (Supp. III 1997), violates separation-of-powers principles, deprives petitioners of vested property rights without due process of law, or denies petitioners the equal protection of the laws.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-98a) is reported at 172 F.3d 144. The panel opinion of the court of appeals (Pet. App. 101a-139a) is reported at 124 F.3d 162. The opinion of the district court (Pet. App. 140a-184a) is reported at 935 F. Supp. 332.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1999. The petition for a writ of certiorari was filed on June 21, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the mid-1970s, pre-trial detainees in the New York City jails brought seven class actions challenging the constitutionality of their conditions of confinement. Pet. App. 7a. The seven class actions were resolved through consent decrees entered in 1978 and 1979. *Id.* at 6a-7a.

In 1996, the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, Tit. VIII, §§ 801-810, 110 Stat. 1321-66 to 1321-77, became effective. Under the PLRA, prospective relief in prison conditions cases "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. 3626(a)(1)(A) (Supp. III 1997). The PLRA provides for the immediate termination of relief that does not conform to that standard. It specifies that "[i]n any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. 3626(b)(2) (Supp. III 1997). Relief may nonetheless be continued if the court makes written findings based on the record that "prospective relief remains necessary to [remedy] a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, Tit. I, § 123(a)(2), 111 Stat. 2470,

amending 18 U.S.C. 3626(b)(3) (Supp. II 1996). A party may seek termination of prospective relief under Section 3626(b) even if the relief "was originally granted or approved before * * * the date of the [PLRA's] enactment." PLRA, § 802(b)(1), 110 Stat. 1321-70 (18 U.S.C. 3626 note (Supp. III 1997)).*

After the PLRA became effective, the New York City Department of Corrections and its Commissioner moved to terminate the consent decrees, on the ground that they had been entered without the findings required by the PLRA. Pet. App. 10a. Petitioners opposed the motion to terminate, contending that the PLRA's termination provisions violate Article III and deny due process and equal protection of the laws. *Ibid.* Petitioners also requested an opportunity to show that the relief in the decrees remains necessary to remedy a constitutional violation. *Ibid.* The United States intervened to defend the constitutionality of the PLRA. *Id.* at 11a. The district court rejected petitioners' constitutional arguments and vacated the consent decrees. *Id.* 140a-184a. The court also denied petitioners' request for an opportunity to show that the relief in the decrees remains necessary to remedy a constitutional violation. *Id.* at 12a.

2. A panel of the court of appeals affirmed in part and reversed in part. Pet. App. 101a-139a. The panel interpreted the PLRA to prevent federal enforcement

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* Under 18 U.S.C. 3626(b)(1) (Supp. III 1997), all decrees, including those entered with the necessary findings, are also subject to periodic review to determine whether they remain necessary to remedy a constitutional violation. Section 3626(b)(1) provides for such review two years after the entry of relief, one year after a denial of a motion to terminate, and, in the case of pre-PLRA decrees, two years after the date of enactment. In April 1998, all pre-PLRA decrees became subject to periodic review.

of consent decrees that do not conform to its standards, but not to require termination of the decrees themselves. The panel therefore concluded that, "while the defendants may be entitled to immediate termination of prospective relief from the *federal* courts, there is nothing to prevent the plaintiffs from seeking the enforcement of the Consent Decrees in *state* courts." *Id.* at 103a. The court believed that its interpretation of the PLRA was necessary to avoid serious constitutional questions. *Id.* at 116a, 121a-122a, 125a.

3. On rehearing en banc, the court of appeals affirmed the district court's decision insofar as it upheld the constitutionality of the immediate termination provision, and reversed the district court's decision insofar as it vacated the consent decrees. Pet. App. 1a-98a. Disagreeing with the panel, the en banc court first held that the PLRA mandates termination of consent decrees that do not conform to the PLRA's standards, not just the termination of federal court enforcement. *Id.* at 21a-23a. The court therefore concluded that, once such relief is terminated, it may not be enforced in state court. *Id.* at 23a-25a. The court held, however, that the district court erred in "vacating" the decrees. The court explained that "[t]he Act states that such decrees are to be 'terminat[ed]'; it does not speak of vacatur or use the term 'vacate.'" *Id.* at 28a.

The court rejected petitioners' contention that Section 3626(b) violates Article III by requiring the reopening of a final judgment. Pet. App. 30a-33a. The court explained that, under *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), "Congress lacks the authority to alter a finally rendered judgment ordering the payment of money. On the other hand, to the extent that a court's final judgment con-

sists of an injunction, Congress may require alteration or termination of its future effect if the law on which the injunction was predicated has been changed." Pet. App. 33a. The court held that the PLRA is constitutional under those standards. The court reasoned that: "By statute Congress has altered the courts' remedial powers so that, in this class of cases, injunctions may not be issued if they are not constitutionally mandated. Congress may accordingly require the termination of the executory portions of injunctions that exceed the courts' present remedial powers." *Ibid.*

The court next rejected petitioners' due process claim, reasoning that petitioners do not have a constitutionally protected property interest in the continuation of the prospective relief in the decrees. Pet. App. 38a-39a. The court also rejected petitioners' equal protection claim, explaining that Section 3626(b) is rationally related to the legitimate goal "of limiting the grant or continuation of prospective relief in this context to no more than what is found necessary to remedy the violation of a federal right." *Id.* at 41a. The court held, however, that the district court had erred in failing to give petitioners an opportunity to present evidence to show that there is a current and ongoing violation of a federal right. *Id.* at 43a. The court therefore remanded for further proceedings on that issue. *Ibid.*

Judge Jacobs (joined by Chief Judge Winter, and Judges Kearse, Walker, McLaughlin, Cabranes, and Parker) filed a concurring opinion explaining why he believed it was appropriate for the court to address the question whether a terminated decree is enforceable in state court. Pet. App. 45a-46a. Judge Leval (joined by Judge Oakes, and joined in part by Judge Calabresi), concurred in part. He argued that the question whether a terminated decree can be enforced in state

court is not properly before the court and that the en banc court's resolution of that issue is dicta. *Id.* at 47a-54a. Judge Calabresi, the author of the panel decision, concurred in the result. He adhered to his view that the PLRA does not require termination of the decree itself and that the decree can therefore be enforced in state court. *Id.* at 55a-98a.

ARGUMENT

The court of appeals correctly held that the PLRA's immediate termination provision is constitutional. The seven other circuits that have addressed the question have reached the same conclusion. See *Berwanger* v. *Cottey*, 178 F.3d 834 (7th Cir. 1999); *Nichols* v. *Hopper*, 173 F.3d 820 (11th Cir. 1999); *Imprisoned Citizens Union* v. *Ridge*, 169 F.3d 178 (3d Cir. 1999); *Hadix* v. *Johnson*, 133 F.3d 940 (6th Cir.), cert. denied, 118 S. Ct. 2368 (1998); *Inmates of Suffolk County Jail* v. *Rouse*, 129 F.3d 649 (1st Cir. 1997), cert. denied, 118 S. Ct. 2366 (1998); *Dougan* v. *Singletary*, 129 F.3d 1424 (11th Cir. 1997), cert. denied, 118 S. Ct. 2375 (1998); *Gavin* v. *Branstad*, 122 F.3d 1081 (8th Cir. 1997), cert. denied, 118 S. Ct. 2374 (1998); *Plyler* v. *Moore*, 100 F.3d 365 (4th Cir. 1996), cert. denied, 520 U.S. 1277 (1997). This Court has denied petitions for review in five of those cases, and there is no reason for a different outcome here. The petition for a writ of certiorari should therefore be denied.

1. a. Petitioners err in contending (Pet. 17-20) that Section 3626(b) violates the separation-of-powers principles set forth in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). In *Plaut*, the Court held that Congress may not require federal courts to reopen final judgments dismissing claims for monetary relief. *Id.* at 218-219. *Plaut* did not suggest, however, that Congress is

precluded from providing for the termination of prospective relief to the extent that such relief fails to conform to new legal standards. To the contrary, the Court reaffirmed its earlier decision in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), which it characterized as upholding Congress's power to "alter[] the prospective effect of injunctions entered by Article III courts." *Plaut*, 514 U.S. at 232. The critical difference is that, while a final judgment on a claim for monetary relief represents "the last word of the judicial department with regard to a particular case or controversy," *id.* at 227, an injunction is always subject to modification or termination in light of a "significant change either in factual conditions or in law," *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). Thus, as the courts of appeals have uniformly concluded, Congress may not require courts to reopen final judgments on claims for monetary relief, but Congress may require the modification of prospective relief in accordance with a change in the applicable law. See, *e.g.*, *Hadix*, 133 F.3d at 942-943; *Dougan*, 129 F.3d at 1426; *Gavin*, 122 F.3d at 1085-1088; *Plyler*, 100 F.3d at 371-372.

As the courts of appeals have further concluded, Section 3626(b) falls on the constitutional side of that line. *E.g.*, *Hadix*, 133 F.3d at 943; *Dougan*, 129 F.3d at 1426-1427; *Gavin*, 122 F.3d at 1085-1088; *Plyler*, 100 F.3d at 372. Section 3626(b) applies only to "prospective relief." 18 U.S.C. 3626(b) (Supp. III 1997). It also requires a court to terminate such relief only when the relief does not conform to Congress's new legal standard for awarding equitable relief in prison conditions cases involving consent decrees. Although courts could previously enter a consent decree that provided for relief greater than that required by federal

law, *Rufo*, 502 U.S. at 389, the PLRA alters judicial remedial authority in consent decree cases by providing that relief entered pursuant to a consent decree may "extend no further than necessary to correct the violation of the Federal right." 18 U.S.C. 3626(a)(1)(A) (Supp. III 1997). Consistent with *Plaut* and *Wheeling & Belmont Bridge*, Congress had authority to provide that existing consent decrees should be modified so that the prospective relief in those decrees conforms to Congress's new remedial standard.

Petitioners contend (Pet. 13) that *Wheeling & Belmont Bridge* is distinguishable, because in that case "Congress had simply altered the substantive legal rights that the injunction enforced—legal rights that, unlike the constitutional rights asserted in the instant cases, were entirely within Congress's power." That suggested distinction is unpersuasive. Although Congress lacks power to modify constitutional rights, Congress had the authority to alter the applicable *remedial* law in cases alleging violation of constitutional rights by limiting the authority of courts to award relief to that which is necessary to remedy a violation of federal law. See *Yakus* v. *United States*, 321 U.S. 414, 441-442 & n.8 (1944) (upholding Congress's authority to restrict the remedial authority of courts and noting numerous instances in which Congress has exercised such authority). Having made that change in remedial law, Congress also had the authority under *Plaut* and *Wheeling & Belmont Bridge*, to provide that previously issued injunctions may remain in effect only if they comply with that new remedial standard. As Judge Selya explained in *Inmates of Suffolk County Jail* v. *Rouse*, "[t]he relevant underlying law in this case * * * relates to the district court's authority to issue and maintain prospective relief absent a violation of a

federal right, and the PLRA has truncated that authority." 129 F.3d at 657. If a consent decree fails to meet the PLRA standards, termination of the decree in response to the PLRA, "therefore, merely effectuates Congress's decision to divest district courts of the ability to construct or perpetuate prospective relief when no violation of a federal right exists." *Ibid.*; see also *Plyler*, 100 F.3d at 372 ("The Inmates fail to understand that the applicable law is not the Eighth Amendment, but rather is the authority of the district court to award relief greater than that required by federal law.").

b. Petitioners also err in contending (Pet. Supp. Br. 2) that the Ninth Circuit's recent en banc decision in *Taylor* v. *United States*, No. 97-16069, 1999 WL 402748 (June 18, 1999), suggests that review should be granted in this case. In *Taylor*, the Ninth Circuit held that the case before it was moot. It therefore did not resolve the question whether the PLRA's termination provision violates Article III. 1999 WL 402748, at *1 ; *id.* at *9 (Tashima, J., concurring in part).

Petitioners seek to rely (Pet. Supp. Br. 3-5) on Judge Rymer's view that the PLRA could not be applied constitutionally to the judgment at issue in that case. But Judge Rymer spoke for only five of the eleven judges on the en banc court on that issue. 1999 WL 402748, at *6-*9. One judge did not reach the issue, *id.* at *9 (Tashima, J., concurring in part), and five judges disagreed with Judge Rymer's constitutional analysis, *id.* at *17-*22 (Wardlaw, J., joined by Thompson, Kleinfeld, Silverman, and Graber, JJ., dissenting).

In any event, Judge Rymer perceived a constitutional difficulty with the PLRA only as applied to cases in which a judgment has been fully executed and is not subject to further supervision. 1999 WL 402748, at *9. Judge Rymer distinguished the circuit decisions up-

holding the PLRA's immediate termination provision on the ground that they all involved consent decrees that were subject to continuing judicial supervision. *Id.* at *8. Since the consent decrees in this case are subject to continuing judicial supervision, Judge Rymer's opinion provides no support for petitioners' constitutional challenge here.

2. Petitioners also contend (Pet. 20-24) that the immediate termination provision deprives them of vested property rights in violation of the Due Process Clause. Prospective orders, however, are always subject to possible modification or termination, and that principle is fully applicable to consent decrees. *Rufo*, 502 U.S. at 378. Thus, as the court of appeals concluded (Pet. App. 38a-39a), petitioners had no vested property interest protected by the Due Process Clause in the prospective relief embodied in the consent decrees. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273-274 (1994) (plaintiffs do not have a vested right in an injunctive decree); see also *Inmates of Suffolk County Jail*, 129 F.3d at 658; *Dougan*, 129 F.3d at 1426-1427; *Gavin*, 122 F.3d at 1090-1091; *Plyler*, 100 F.3d at 374-375.

3. Petitioners' contention (Pet. 24-27) that Section 3626(b) denies them equal protection of the laws is also without merit. Because Section 3626(b) does not interfere with a fundamental right or employ a suspect classification, it is subject to "rational basis" review. *Heller* v. *Doe*, 509 U.S. 312, 320 (1993). Section 3626(b) easily satisfies that standard. As the court of appeals explained, "[t]he objective of limiting the grant or continuation of prospective relief in this context to no more than what is found necessary to remedy the violation of a federal right is unquestionably a legitimate one." Pet. App. 41a; see also *Inmates of Suffolk County*

Jail, 129 F.3d at 660; *Dougan*, 129 F.3d at 1427; *Gavin*, 122 F.3d at 1090; *Plyler*, 100 F.3d at 374.

Petitioners' reliance (Pet. 24-26) on *Romer* v. *Evans*, 517 U.S. 620, 632-633 (1996), and *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 447-450 (1985), is misplaced. In those cases, the Court held that the legislation at issue did not bear a rational relationship to any legitimate government objective but instead could only be understood as being based on irrational prejudice against the group adversely affected. *Ibid.* Because the PLRA is rationally related to a legitimate government objective and is not based on animus against inmates, *Romer* and *City of Cleburne* are inapposite here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

JAMES BENJAMIN, *et al.*,

Petitioners,

—against—

BERNARD KERIK, Commissioner,
New York City Department of Correction, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

Respondents' brief in opposition to the petition for certiorari (Resp. Br.) seeks unconvincingly to minimize the degree to which the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(b), retroactively reopens the judgments in this case. They state:

"When Congress established new standards for the termination of injunctive relief in prison litigation under § 3626, it facilitated the appropriate revision or termination of relief in conformity with *Board of Education v. Dowell*, 498 U.S. at 247-50, and *Freeman v. Pitts*, 503 U.S. at 491." Resp.Br. at 15.

Contrary to this picture of harmony, Congress's establishment of "new standards" completely overturned the traditional equitable standard applied in those cases, under which a decree may be terminated if defendants have complied with the decree for a reasonable period of time, have exhibited a good-faith commitment to the decree and the underlying law, and are "unlikely to return to [their] former ways." *Board of Educ. v. Dowell*, 498 U.S. 237, 247-50 (1991); *accord Freeman v. Pitts*, 503 U.S. 467, 491 (1992). The PLRA replaces this equitable standard with the command to terminate judgments on motion if they were not accompanied by findings that the law did not require at the time judgment was entered, absent proof of a "current and ongoing" federal law violation. 18 U.S.C. § 3626(b). The PLRA's requirements thus constitute, quite literally, "a reopening requirement which did not exist when the judgment was pronounced," which Congress may not enact consistently with the principle of separation of powers. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 234 (1995); *see* Petition for Certiorari (Pet.) at 10-12.

The United States, in its brief (U.S.Br.), does not deny that Congress has imposed a new reopening requirement, but says that Congress is entitled to do so in injunctive cases:

> The critical difference is that, while a final judgment on a claim for monetary relief represents "the last word of the judicial department with regard to a particular case or controversy," . . . an injunction is always subject to modification or termina-

> tion in light of a "significant change either in factual conditions or in law," . . . . Thus, as the courts of appeals have uniformly concluded, Congress may not require courts to reopen final judgments on claims for monetary relief, but Congress may require the modification of prospective relief in accordance with a change in the applicable law. . . .

U.S.Br. at 7 (citations omitted).

The United States' sharp distinction between money judgments (to which it annexes *Plaut*'s phrase "the last word of the judicial department with regard to a particular case or controversy") and injunctive judgments ("always subject to modification or termination"), does not correspond to reality. Rule 60(b), Fed.R.Civ.P., which codifies federal courts' power to reopen their judgments, *see Plaut*, 514 U.S. at 233-34, provides a number of grounds for relief, many of which are as applicable to cases seeking money judgments as to injunctions: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud, . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated. . . ."[1]

More importantly, in arguing that the holding of *Plaut* barring new reopening requirements does not

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[1] *See, e.g. Surety Ins. Co. of Calif. v. Williams*, 729 F.2d 581 (8th Cir. 1994) (holding monetary settlement could be set aside under the Rule); *Whitaker v. Associated Credit Services, Inc.*, 946 F.2d 1222, 1224 (6th Cir. 1991) (holding that mistaken offer of judgment could be set aside after acceptance); *see also Fraige v. American-National Watermattress Corp.*, 996 F.2d 295 (Fed. Cir. 1993) (setting aside judgment finding patent invalid).

apply to injunctive judgments, the United States runs afoul of fundamental constitutional principles. As *Plaut* makes clear, 511 U.S. at 218-19, *see* Petition at 10-11, finality with respect to legislative reopening is an essential part of the judicial power conferred by Article III--a power that extends to cases "in Law *and Equity*." U.S.Const., Art. III, § 2 (emphasis supplied). In order to distinguish *Plaut* and defend the statute's constitutionality, the United States declares injunctive jurisprudence to be outside of this fundamental principle--a proposition radically inconsistent with Article III and the separation of powers.

Thus, the United States' argument does not support the denial of certiorari herein. Rather, it helps demonstrate the depth and importance of the questions of finality and of legislative and judicial powers that underlie the present controversy,[2] and thereby supports the appropriateness of granting review. That point is underscored by the filing, after the Petition in this case, of two additional certiorari petitions in cases involving separation of powers questions arising from the PLRA,[3] as well as by the badly split *en banc* deci-

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[2] The breadth of those questions is not in doubt, given the wide range of subjects to which federal court injunctive jurisprudence is addressed. Pet. at 18-20.

[3] *See Loyd v. Alabama Dept. of Corrections*, 176 F.3d 1336 (11th Cir. 1999), *petition for cert. filed*, 68 U.S. Law Week 3129 (Aug. 24, 1999); *French v. Duckworth*, 178 F.3d 437 (7th Cir. 1999) (striking down PLRA automatic stay provision), *petition for cert. filed sub nom. Superintendent of Pendleton Correctional Facility v. French*, 68 U.S. Law Week 3116 (Aug. 17, 1999).

sion in *Taylor v. United States*, 181 F.3d 1017 (9th Cir. 1999), detailed in Petitioners' Supplemental Brief. These questions will not go away and it is time for this Court to provide guidance concerning them.

Much of the Respondents' brief attacks the judgments in these cases on grounds that have nothing to do with the PLRA or the questions presented by the Petition, and in any case are wrong. Their invocation of *Lewis v. Casey*, 518 U.S. 343 (1996), to attack the consent judgments in this case as overbroad and as "wildly intrusive," Resp.Br. at 2, omits the obvious: these *consent* decrees were presented to the court by *agreement*, meeting *Lewis*'s command that prison officials have the first opportunity to formulate remedial plans. 518 U.S. at 362-63. Their complaint that the consent decrees "go well beyond present constitutional norms," Resp.Br. at 4, is equally fatuous. ". . . [A]lmost any affirmative decree beyond a directive to obey the Constitution necessarily does that." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992). Their complaint that the consent decrees are enforceable in perpetuity, "contrary to this Court's jurisprudence," Resp.Br. at 5, is simply wrong. That jurisprudence is controlling, and a showing that Respondents had complied with the judgments for a reasonable period of time, had exhibited a good-faith commitment to the decree and the underlying law, and were "unlikely to return to [their] former ways," *Board of Educ. v. Dowell*, 498 U.S. at 247-50; *accord Freeman v. Pitts*, 503 U.S. at 491, would entitle them to relief. Thus, even if these arguments were correct--and as shown, they are not--Respondents would not need the PLRA to pursue and prevail on them, and they are irrelevant to the present controversy.

These red herrings should not distract the Court from the reality that the judgments in these cases were properly entered under well established legal standards, and their reopening under the subsequently

enacted PLRA would violate the principles of finality and separation of powers announced by this Court in *Plaut v. Spendthrift Farms, Inc.*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
September 8, 1999

Respectfully submitted,

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